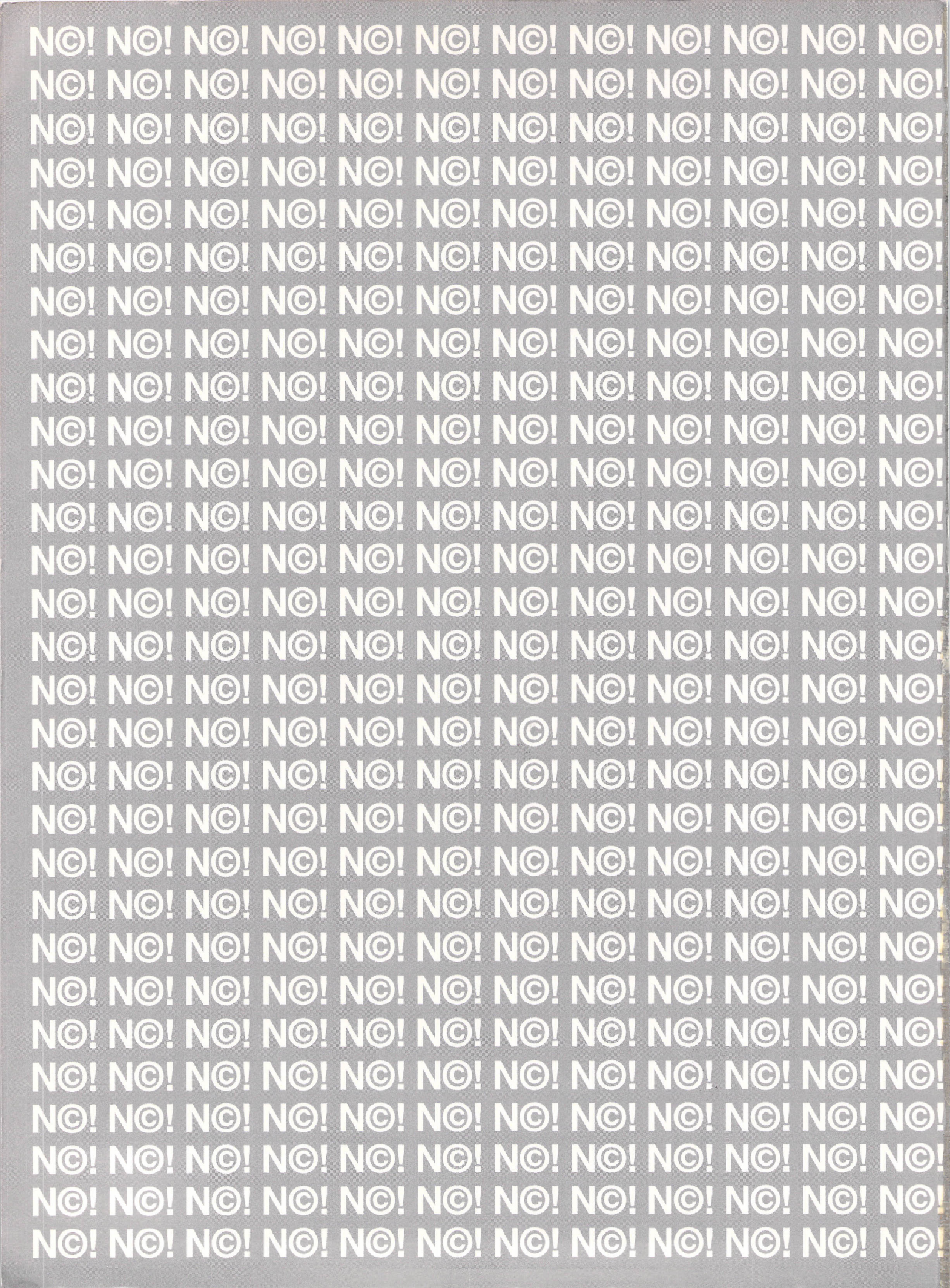
FAIR USE

THE STORY OF THE LETTER U AND THE NUMERAL 2

BY NEGATIVLAND

with a Foreword by Francis Gary Powers Jr.

WITH CD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WE LIVE IN A WORLD WHERE nothing is what we were taught it was. Art is business, business is war, war is advertising, and advertising is art. We are bombarded with information and entertainment. Negativland responds to this environment by making music that uses fragments and samples from existing media of all kinds.

FAIR USE: The Story of the Letter U and the Numeral 2 tells the story of two lawsuits and Negativland's fight for the right to make art out of corporately "owned" culture. It takes you deep inside the group's legal, ethical and artistic odyssey for an unusual and overwhelming examination of why such work is being done now, and the ironic absurdities that ensue when corporate commerce, contemporary art, and pre-electronic law collide over one 13-minute recording.

In 1991 Negativland released a single called *U2*. It contained two unauthorized "found sound" parody versions of the song *I Still Haven't Found What I'm Looking For,* originally written by the Irish supergroup U2. It used a 35-second sample of U2's recording of the song, obscene and hilarious out-takes of Top 40 deejay Casey Kasem attempting to introduce a U2 song, and featured a cover design that, at first glance, actually made it appear to be a new release by U2. This very funny little record was no joke to U2's label, Island Records, who immediately sued it out of existence for trademark and copyright infringement.

In 1992 Negativland released a 96-page magazine-plus-CD entitled *The Letter U and the Numeral 2* that documented that whole episode. It too was sued out of existence for copyright infringement– this time by Negativland's now-former label, SST Records.

Presented chronologically, *FAIR USE* contains that suppressed magazine in its entirety, and goes on to add all the bizarre events that have happened since then in this modern saga of criminal music. Also included is a definitive Appendix of legal and artistic references on the fair use issue.

Packaged inside this book is a full-length CD containing a brand new 45-minute collage piece by Negativland, *Dead Dog Records*, which is both about artistic appropriation and an example of it, plus a 26-minute "review" of the U.S. Copyright Act by Crosley Bendix, Director of Stylistic Premonitions for the Universal Media Netweb.

THIS IS ABOUT NEGATIVLAND

THIS IS ABOUT U2

THIS IS ABOUT CASEY KASEM

THIS IS ABOUT ISLAND RECORDS

THIS IS ABOUT SST RECORDS

THIS IS ABOUT CORPORATE LAWYERS

THIS IS ABOUT THE COPYRIGHT ACT

THIS IS ABOUT MONEY

THIS IS ABOUT POWER

THIS IS ABOUT CENSORSHIP

THIS IS ABOUT ART

THIS IS ABOUT CASE #91-4735AAH (GHKx)

THIS IS ABOUT CASE #92-6692DWW (JGx)

NEGATIVLAND

FAIR USE

THE STORY OF THE LETTER U AND THE NUMERAL 2

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(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

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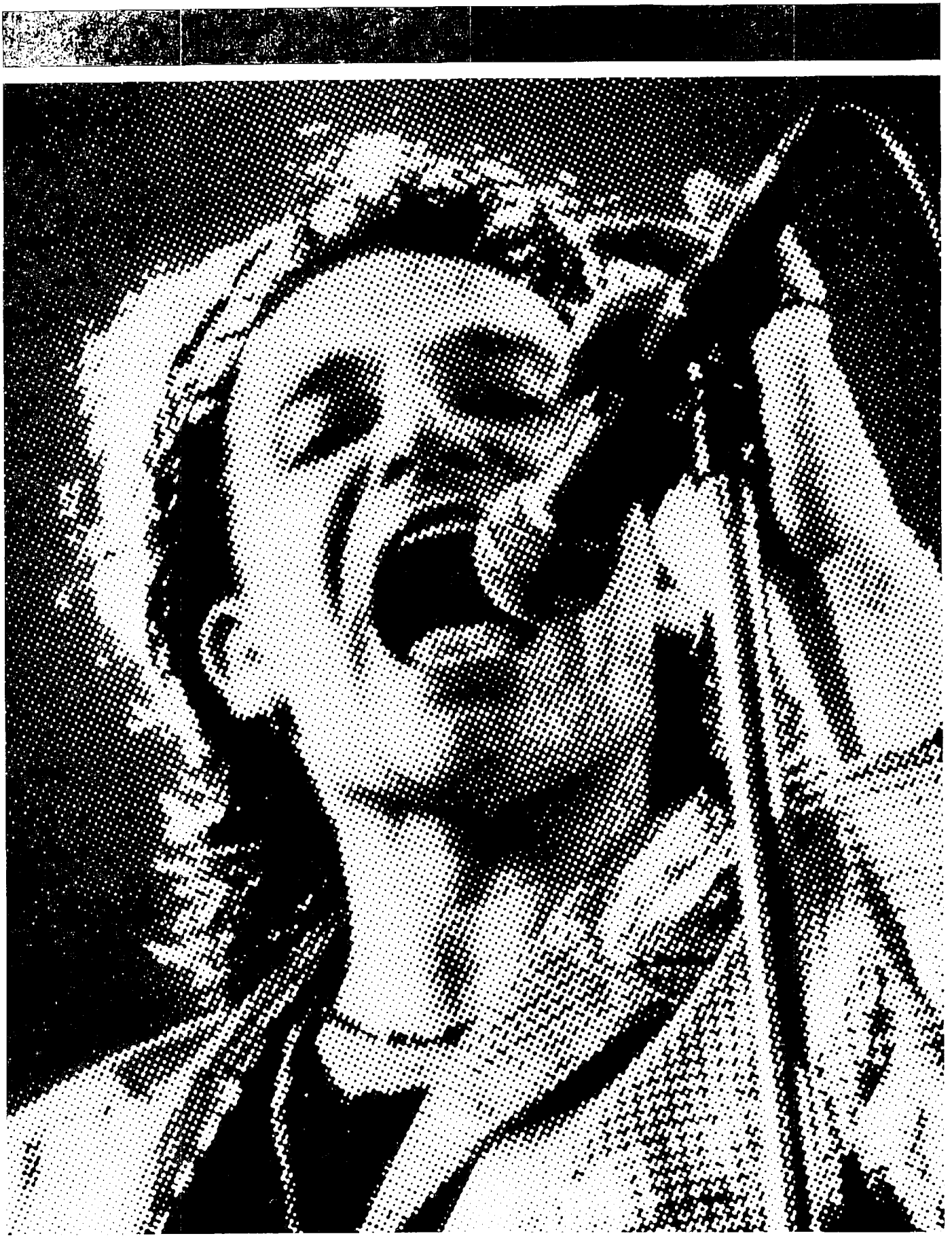

"And I must be an acrobat, to talk like this and act like that"

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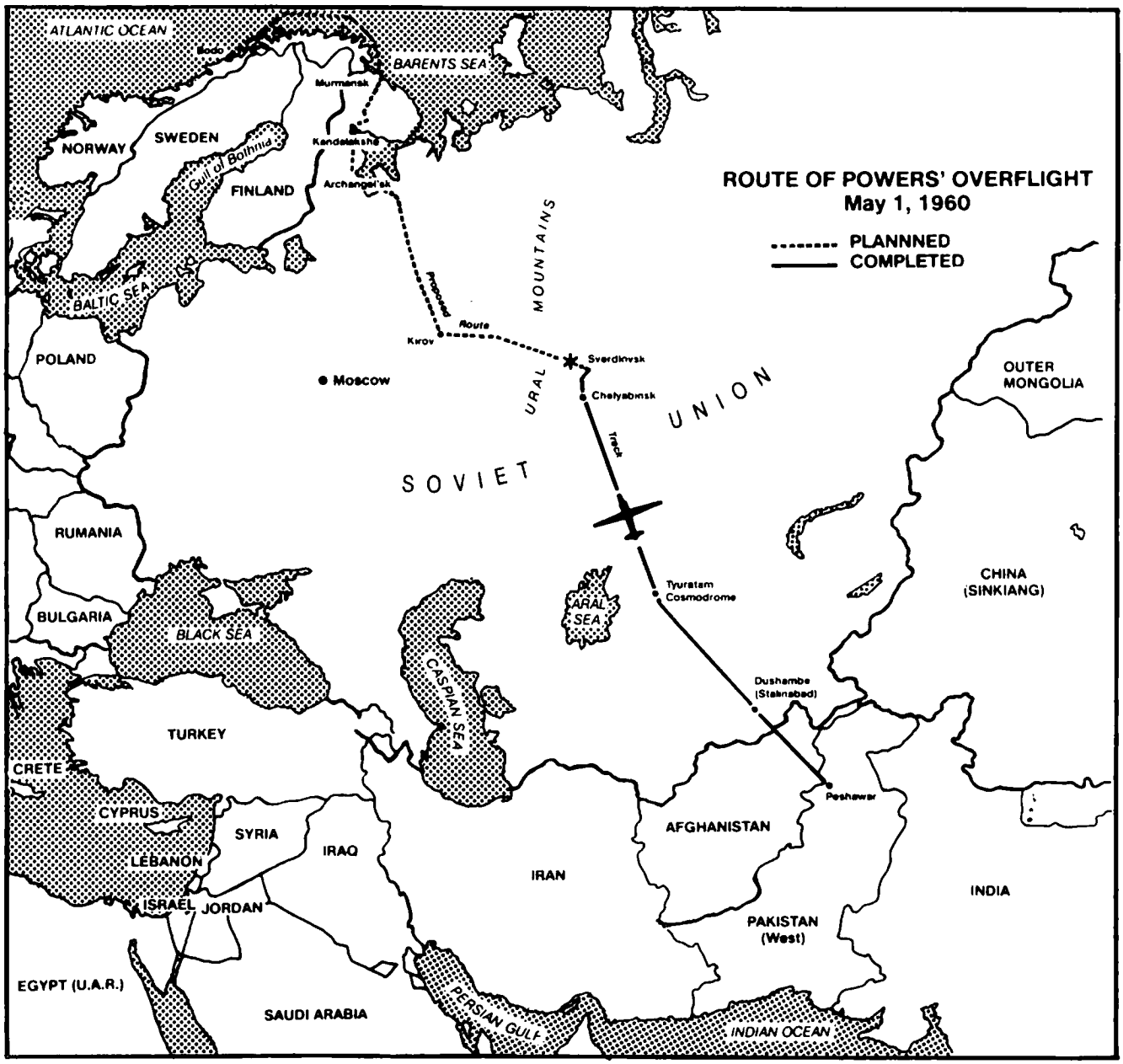
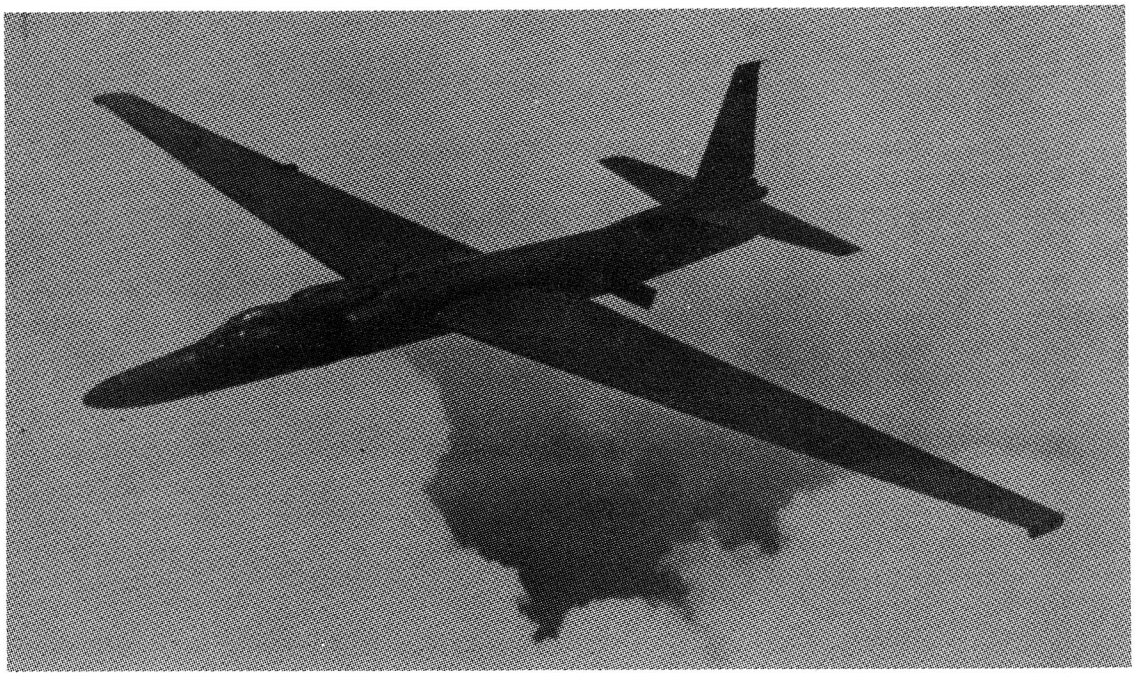
Power's Flight 1 May 1960





FOREWORD

As the spokesman for the Francis Gary Powers family, I appreciate this opportunity to provide a Foreword to Negativland's book. The letter U and the numeral 2 were well known long before a rock band from Ireland picked them for their name. This Foreword recaps the story of my father, Francis Gary Powers, a secret spyplane called the U–2, and the international incident that made them both famous.

During my early childhood, I never realized that my father was different than anyone else's. My first real awareness of this came during his funeral at Arlington National Cemetery where I saw the swarm of media gathered there and watched the flash bulbs explode as the Honor Guard carried my father's casket to its final stand. As I became aware of my father's role in history, I wanted to know more about the controversy surrounding his famous flight. For the last 10 years I've been on a journey to learn all I could about my father and what happened in those years before I was born. Each generation has moments and acts of great significance. My father's story is about one of those acts, how our country decided to deal with it, and the consequences of that decision.

In April, 1956, Francis Gary Powers, Sr. "resigned" from the Air Force to become a CIA pilot. In that year he was sent to Turkey to fly electronic surveillance missions along the U.S.S.R. border. On May 1st, 1960, my father took off from an air base outside of Peshawar, Pakistan in a Lockheed U–2 high-altitude surveillance aircraft on what was to be his 28th (and last) mission. This was the first mission to attempt a complete overflight across the Soviet Union. The objective of photographing the Intercontinental Ballistic Missile (ICBM) sites at Sverdlovsk and Kirov, requiring nine hours' flying time to cover 3,800 miles, made the mission extremely dangerous.

Unknown to my father, the Soviet air defense forces were ready and Khrushchev wanted to shoot down a U–2 at all costs. A number of MIG-19 fighters would attempt zoom climb intercepts of the world's highest flying aircraft. Missile site radar tracked the U–2 and prepared to launch SA-2 SAM missiles at the best possible moment. On reaching Sverdlovsk at his assigned altitude, about 1300 miles within Soviet territory, my father once again flipped the switches that activated the U–2's reconnaissance cameras.

Soon after there was a bright orange flash. Some fourteen SA-2's had been simultaneously launched at the U–2, exploding near the aircraft. After the flash the U–2 nosed down and wouldn't respond to the controls. The lightly-constructed and fragile spyplane was overstressed by the shock waves and the fuselage had failed somewhere near the tail. After falling several thousand feet he managed to free himself from the falling wreckage, and parachuted into the outskirts of Sverdlovsk. There he was captured and arrested, and then taken to Lubyanka Prison in Moscow where he was held and interrogated by the KGB.

Knowing that the plane had not returned, and believing that my father had died in the crash, the U.S. public information office in Turkey released the first of many cover stories that an "unarmed weather reconnaissance aircraft" had vanished during a routine flight, and that the pilot had reported trouble with his oxygen equipment. For five days, the Soviet Union said nothing. Then, on May 5th, 1960, Premier Khrushchev said an American plane had been shot down after violating Soviet airspace. He made no mention of the pilot. Later that day, adjusting the cover story, NASA reported that the previously missing U–2 might have accidently "strayed" across the Soviet border after its pilot became unconscious due to lack of oxygen. The CIA assured President Eisenhower that the pilot could not be alive. On May 6th, the State Department said there had been no attempt to violate Soviet airspace, while angry Congressmen and Senators accused Khrushchev of shooting down a weather plane on purpose to scuttle the upcoming summit meeting.

The next day, Khrushchev sprang his trap. He announced that they had not only recovered the plane and its contents, but had captured the pilot who was "alive and kicking" and had confessed to spying for the CIA. The State Department again changed their cover story, admitting that the U–2 "might have made an information gathering flight" but that it had not been authorized by the President. Allen Dulles, head of the CIA, offered to resign and take full responsibility for the lie. Finally, on May 11th, President Eisenhower stated that he had authorized the espionage flight as "a distasteful but vital necessity" in order to avert another Pearl Harbor. This unprecedented admission was one of the first public revelations that our President could be misled by his own intelligence organizations, and that the American people could be lied to by their own President.

On May 16th, the Paris Summit talks collapsed. The Soviets had gained a propaganda coup of enormous proportions and paraded my father before the world press. They staged a widely publicized public trial for Francis Gary Powers which was designed to embarrass the United States, and my father was sentenced to 10 years in a Soviet prison. However, he was exchanged after 21 months for Soviet spy Rudolph Abel, who was being held in the United States. During my father's imprisonment, all kinds of misstatements, untruths, and cover stories appeared in the press.

Upon returning to the U.S. my father faced the mixed opinions of an embarrassed America. Some people criticized my father because he "didn't follow orders" and kill himself rather than be captured. In fact, there had never been any such orders. To the contrary, the CIA's instructions on capture were, and I quote, "If capture appears imminent, pilots should surrender without resistance and adopt a cooperative attitude toward their captors." Furthermore, "Pilots are perfectly free to tell the full truth about their mission with the exception of certain specifications about the aircraft." He appeared on March 6, 1962 in an open hearing before the Senate Armed Services Committee. The Senate Committee exonerated him of any wrongdoing and called him "a young man performing well in a dangerous job."

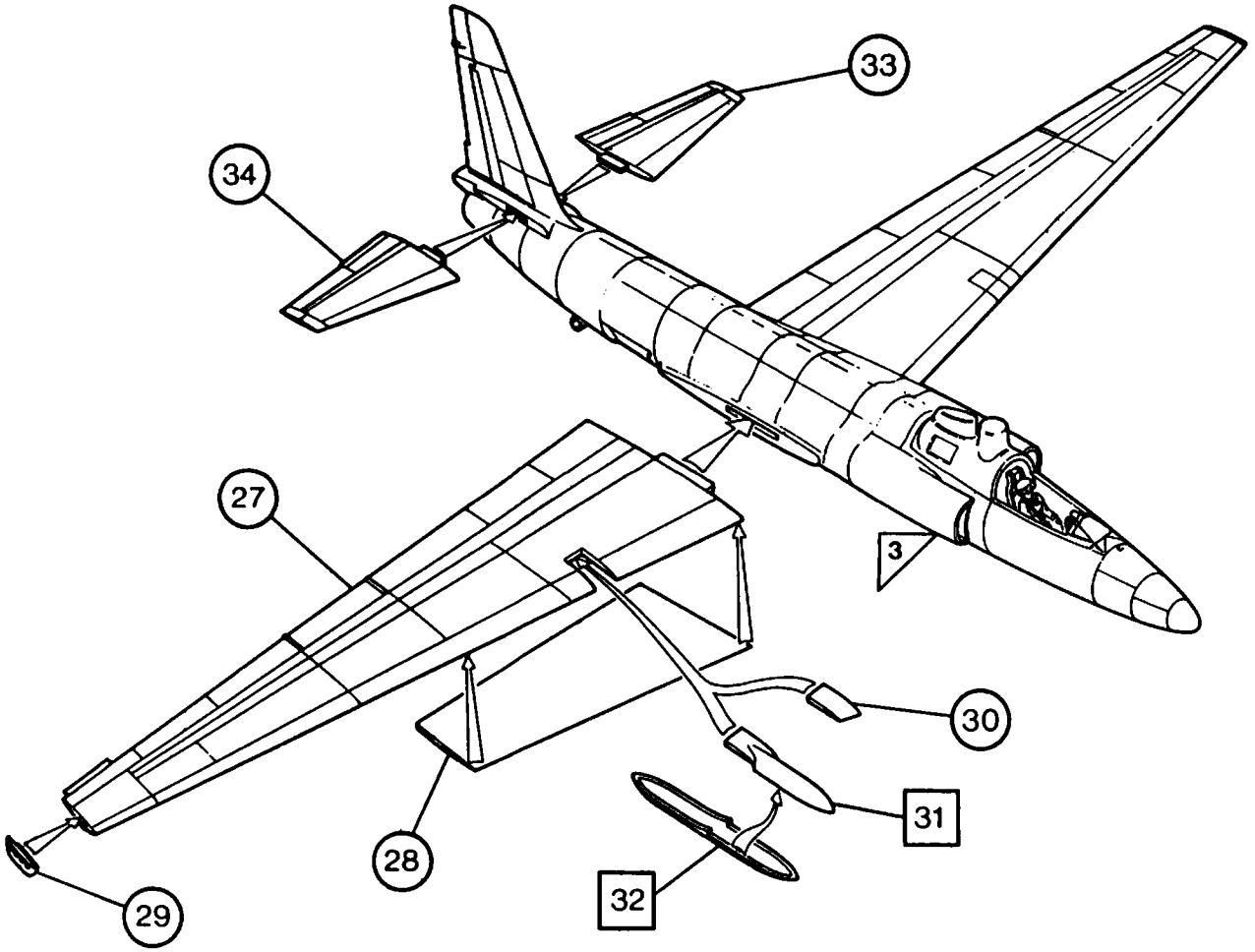
Despite the Senate committee's clearance, and despite being awarded the highest honor the CIA can give, its Intelligence Star for Valor, as well as the Air Force's Distinguished Flying Cross, my father was the spy who was still "out in the cold." The government did nothing to clear up the false cover stories and disinformation which had been circulated about the mission and my father's performance in it. Neither would the CIA permit him to write his own account of the incident until many years later. There remained many gaps between what the government knew and what it told to the public. Francis Gary Powers died in August, 1977 while piloting a traffic helicopter for a Los Angeles TV station.

In 1991, a very different letter U and numeral 2 was shot down. To discover the true story behind that incident, I suggest you read the rest of this book.

Francis Gary Powers, Jr.

The views expressed in this book are those of the authors and should not be ascribed to any member of the Francis Gary Powers family.

Francis Gary Powers, Sr.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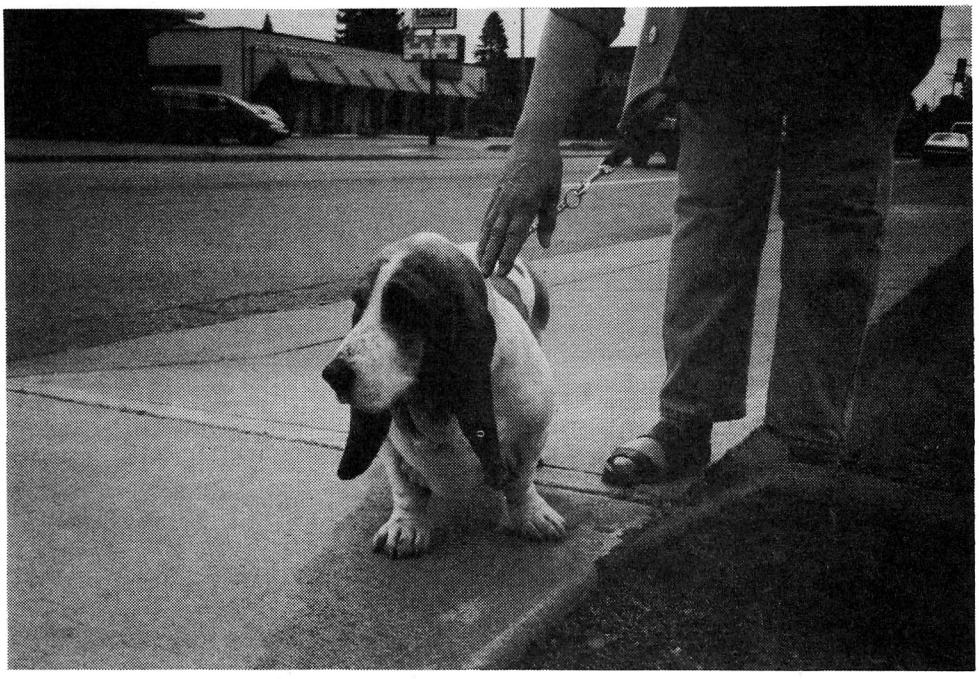

PROLOGUE

In the fall of 1990, Negativland finshed a 13-minute single that came to be known as *U2/Negativland*. The inspiration to make this record had come when we were given a cassette at one of our live shows in Portland, Oregon, and another cassette had arrived from a friend of ours in Los Angeles. These cassettes turned out to contain raw out-takes from "Casey Kasem's Top 40" radio show, in which Casey was attempting to introduce a new band from Ireland named U2, flubbing a song dedication to a listener's recently deceased pet (a dead dog named Snuggles), complaining about his format flow, lapsing into obscenities, and so forth. These were unusually hilarious bloopers, which we learned had been circulating hand-to-hand among out-take afficionados for several years, and we were inspired to create some sort of audio collage around this tape. Since Casey was introducing U2 at length ("U2, that's the letter U and the numeral 2...") it seemed logical to include some music from U2 in the piece. The idea grew from there.

The single was divided into two parts. *Part I (1991 A Cappella Mix)* used about 30 seconds of the U2 song *I Still Haven't Found What I'm Looking For* as an intro, and then continued the melody using a Negativland chorus of men's voices dramatically humming the tune. Over this we laid in the voice of Casey attempting to introduce U2 to the American public. Negativland member The Weatherman recited his own, somewhat transformed, version of U2's lyrics, and other material was used relating to the term "U2" (people using the phrase "you too," etc.), or relating to the theme of the song (i.e., looking for something and not finding it), or to corporate music or top 40 hits, plus bits of a spoken interview with U2's singer Bono discussing their music, snippets from an MTV Music Video Awards show that sampled from Negativland (!), and numerous other musical and non-musical sounds.

Part II (Special Edit Radio Mix) began with Casey Kasem's spoken dedication to the dead dog, Snuggles, and continued with our own computer-mutilated version of *I Still Haven't Found What I'm Looking For.* We obtained the disk of U2's song from a company that sells MIDI sequencer files of various Top 40 hits, and then modified it with a computer to develop our own unique arrangement of the song– video game sounds playing The Edge's guitar riffs, light bulbs breaking instead of drum fills, etc. Added to that were tapes of Casey making further comments about U2 ("These

guys are from England, [sic] and *who gives a shit?!*") and angry curses at the problematic "flow" of his show, garbled CB radio transmissions revolving around a search for a CB jammer who taunts his pursuers with obscenities, and talk about banned and obscene music. This cut was captioned *Special Edit Radio Mix* in hopes that some unsuspecting deejay might play it on the air without checking it for content first. The record climaxes with an exasperated Casey Kasem screaming:

> "OK: I want a goddamn *concerted effort* to come out of a record that isn't a fucking *up-tempo record* every time I do a goddamn *death dedication!!* It's the *last* goddamn time, I want *somebody* to use his *fuckin' brain* to not come out of a goddamn record, that is, uhh, that, that's up-tempo and I gotta talk about a fuckin' dog dyin'!!!"

We discussed the idea of naming this release *I Still Haven't Found What I'm Looking For,* but decided instead to call it simply *U2*. The record's cover showed the profile of a U-2 spy plane in flight, and our name, Negativland, across the bottom. The graphic artist who was helping us design the cover suggested that we make the letter U and the numeral 2 extremely large. We liked this because it made it look, at first glance, like a U2 record.

In the summer of 1991 as we awaited the August release of *U2* on our label, SST Records, we thought that these concepts, sounds, music, and graphics were all irresistibly great ideas, and that this was probably the most interesting and peculiar record we had ever made.

We had no idea how much more interesting and peculiar things were about to get.

PART ONE

THE LETTER U AND THE NUMERAL 2


U2
NEGATIVLAND

E 4 San Francisco Chronicle ☆ MONDAY, SEPTEMBER 23, 1991

U2's Label Stops Sales of Parody

Los Angeles Daily News

Los Angeles

Island Records apparently found what it was looking for when it got a temporary restraining order demanding that a local independent record company stop selling a takeoff on U2's hit, "I Still Haven't Found What I'm Looking For."

Lawndale-based SST Records agreed to stop marketing and promoting the 15-minute CD and 12-inch single by the five-piece electronic band Negativland, said SST spokesman Ron Coleman.

The group's version of the song includes a smarmy voice making fun of Bono's lyrics, while electronic noise further deconstructs the song.

Bill Adler, Island's vice president of media relations, said the label objected to SST's packaging of the single above all.

On the cover, U2 is printed in large letters, while Negativland is reproduced in small type.

"Our goal is to protect the consumer," Adler said.

"The artwork is deceptive. It's made to look as if it were a new U2 record. We didn't want fans of the group buying this and being tricked, especially given the fact there hasn't been a new U2 release in so long."

Music publisher Warner/Chappell joined the copyright-infringement action, alleging Negativland illegally sampled portions of U2's original recording without permission. A hearing in the matter is set for October 15 in U.S. District Court.

The new U2 album, "Achtung Baby," recorded in Berlin, is due in the stores November 19. The first single, "The Fly," will be out October 22.

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CASTRO Castro-Market, 621-6120
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Billy Wilder's **SUNSET BOULEVARD** 9:10
Tues: **The Night of the Iguana & Baby Doll**

CLAY Fillmore near Clay St., 346-1123
Eric Bogosian in
☐ **SEX, DRUGS, ROCK AND ROLL**
7:30, 9:45—STEREO

GAT

SPIN

10 BEST ALBUMS OF THE YEAR

■ **Negativland, *U2*** (SST). It took a court order to suppress what is quite possibly the most truly subversive rock record ever made. But having attracted the litigious wrath of U2's recording and publishing companies, Negativland's snarky and brilliant multileveled takeoff on the Christian liberals' "I Still Haven't Found What I'm Looking For"—with foulmouthed Casey Kasem samples, a bone-headed Bono interview, and a ditzy disco version—proved yet again that the price of artistic freedom can be hefty legal fees. (Richard Gehr)

ARTFORUM

Real Life Rock

Greil Marcus'

TOP TEN

8 **Negativland: "U2" (SST). The California collage unit makes fun of "I Still Haven't Found What I'm Looking For," and so comprehensively you might begin to feel sorry for Bono. Among numerous interjections and found aural objects, the hook is a sample of D.J. Casey Kasem chirping "That's the letter *U*—and the numeral *two*!" so many times he turns into Mr. Rogers. Squelched just weeks after release by U2's label—if the band has a sense of humor they'll put it out themselves.**

ROCKBEAT

Reproduction or What?

Years before sampling became pop music's trendiest cliché, **Negativland**'s tape-collage compositions used sonic bits from here and there to critique the culture industry. Except for a 1988 hoax surrounding the **David Brom** ax murders, it was all fairly furtive underground stuff. But the Bay Area–based group's new single, "**U2**" (a takeoff on the Dublin supergroup's 1987's "I Still Haven't Found What I'm Looking For"), has roused the litigious wrath of Island Records and Warner/Chappell Music publishers.

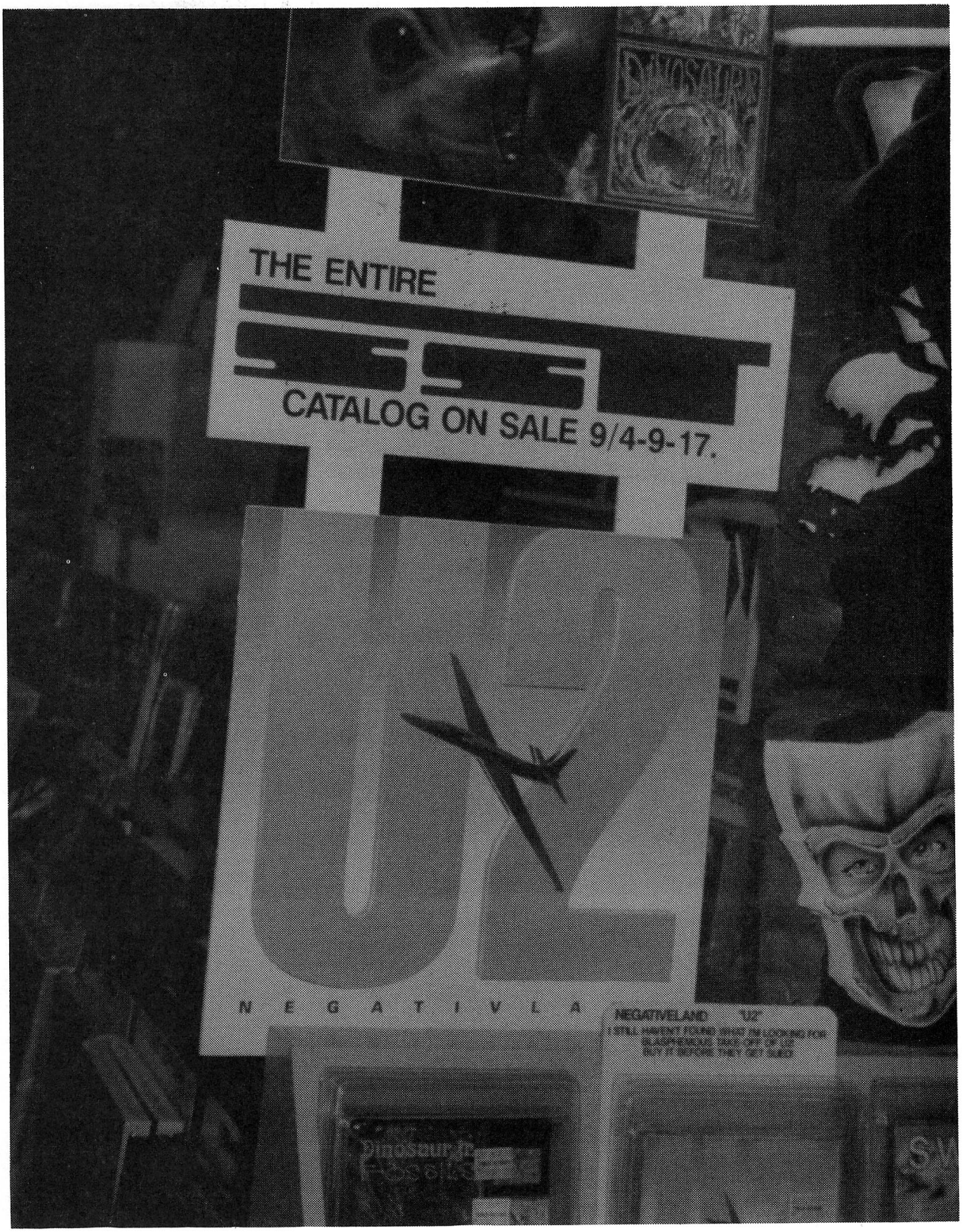
On September 5, two weeks after its release, a federal judge issued a temporary restraining order demanding that SST Records and Seeland MediaMedia (Negativland's fictitious publishing company) recall and hand over to the plantiffs all 6000 or so copies of "U2," citing deceptive packaging, copyright infringement, and image defamation, potentially creating "massive confusion among the record-buying public." Punitive and "trebled" damages, legal costs, and big apologies in the trades are also requested. A preliminary injunction hearing is scheduled for October 15.

The letter *U* and the numeral *2* do indeed loom large on the CD cover, which also features a picture of the eponymous spy plane. The sound material itself, though, is perfectly in keeping with Negativland's decade-long project. Following the muttered phrase "reproduction or what?" the recording splices and overlays a sarcastic recitation of the song's lyrics, a male chorus humming the hook, a jaunty electronic rendition of the tune, salty **Casey Kasem** outtakes from the song's appearance on *American Top 40* ("This is bullshit. Nobody cares. These guys are from England and who *gives* a shit?"), a sample from an MTV awards show that sampled Negativland's *Escape From Noise*, and countless other sound bites commenting reflexively on the parasitic nature of mass culture—all of which makes "U2" the party record of the year.

SST—whose motto remains CORPORATE ROCK STILL SUCKS—is keeping mum except to say it will comply with the court order. Meanwhile, Island's Senior Director of Business Affairs, **Eric Levine**, wouldn't admit the possiblity that the offending package might contain ameliorating artistic, comedic, or parodic intent. "I don't know what that means," he told us. "People even got calls: 'Is this the new U2 record?' " (Although Island apparently had no qualms about appropriating the title of the Dub Syndicate's *Tunes From the Missing Channel* for the label's new rap compilation.)

Commenting from Dublin (where U2 is putting finishing touches on their tastefully titled holiday release, *Achtung Baby*), manager **Paul McGuinness** said of the as-yet-unheard single, "If it's good enough, maybe they'll stick it on a B-side or something." (U2's response to the Pet Shop Boys' discofication of "Where the Streets Have No Name" was: "What have I/What have I/What have I done to deserve this?") Casey Kasem, apparently unaware of his participation on "U2," was unavailable for comment.

"We definitely feel we were naïve not to realize we'd be smashed," admits Negativland's **Mark Hosler**. "But we're surprised at the severity of their response." The group hopes to get a copy of the disc to the band itself. "For all of U2's rhetoric, one would think they might be a little disturbed to see some artists being completely censored, even if they didn't care for what they were saying. The literal message in this action is: Don't fuck with U2. But the real message is: Don't fuck with the corporate control of culture. Don't fuck with the media."


THE ENTIRE
CATALOG ON SALE 9/4-9-17.
NEGATIVELAND

2. Excerpts from the Island/Warner-Chappell Lawsuit

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ISLAND RECORDS LTD. (a United Kingdom Corporation), ISLAND RECORDS, INC. (a New York corporation), WARNER CHAPPELL MUSIC INTERNATIONAL LTD., (a United Kingdom corporation), and WARNER/CHAPPELL MUSIC, INC. (a California corporation),

Plaintiffs,

vs.

SST RECORDS (an entity), SEELAND MEDIA-MEDIA (an entity), NEGATIVLAND (an entity), Gregory Ginn (an individual), Chris Grigg (an individual), Mark Hosler (an individual), Don Joyce (an individual), and David Wills (an individual),

Defendants.

Case No. CV 91-4735AAH (GHKx)

DECLARATION OF ERIC LEVINE IN SUPPORT OF ORDER TO SHOW CAUSE, RE PRELIMINARY INJUNCTION, TEMPORARY RESTRAINING ORDER AND EXPEDITED DISCOVERY

DATE: September __, 1991
TIME:
PLACE: Courtroom
(Judge ANDREW A. HAUK

I.

PRELIMINARY STATEMENT

This Application seeks an ex parte temporary restraining order, preliminary injunction and related relief in order to halt the defendants' unlawful exploitation of a record entitled "U2 Negativland" by using deceptive and misleading packaging in violation of the plaintiffs' rights under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. §1125(a), and by making unauthorized use of a sound recording and musical composition in violation of the rights of certain plaintiffs under the Copyright Act of 1976, as amended (the "Copyright Act"), 17 U.S.C. §101, et. seq.

The plaintiffs include (a) the affiliated record companies (Island Records Ltd. and Island Records, Inc.) which have the exclusive rights throughout the world to manufacture, distribute and sell (either directly or through authorized licensees) sound recordings embodying the performances by the renowned musical group known as "U2", and (b) the affiliated publishing companies (Warner Chappell Music International Ltd. and Warner/Chappell Music, Inc.) which, directly or through affiliated corporations and licensees, have the exclusive rights to publish and administer the copyrights in U2's musical compositions. Plaintiffs are exclusively entitled to use the band's well-known name and mark "U2" in connection with the exploitation of those rights.

The defendants are violating the plaintiffs' rights by selling or otherwise exploiting the "U2 Negativland" recording in interstate commerce using cover artwork, packaging and labelling which is so deceptive as to create the false impression that the recording is a genuine U2 record album. This unlawful conduct -- which will deceive consumers into believing that when they purchase "U2 Negativland" they are buying an album by U2 -- constitutes a violation of Section 43(a) of the Lanham Trademark Act, which prohibits the use of false and misleading packaging which may tend to deceive consumers.

Plaintiffs Island Records Ltd. and Island Records, Inc. have publicized the imminent release of U2's next record album. The defendants' "U2 Negativland" recording constitutes a transparent use of deceptive packaging designed to dupe U2's millions of fans throughout the United States into believing that this "new record" is the widely-anticipated new album by U2. It is not. "U2 Negativland" is nothing less than a consumer fraud, and a blatantly unlawful attempt to usurp the anticipated profits and goodwill to which plaintiffs are entitled from the exploitation of recordings and musical compositions by U2.

Moreover, one of the two songs contained in the "U2 Negativland" recording incorporates an unauthorized copy of a portion of U2's recording of the song "I Still Haven't Found What I'm Looking For", which is part of U2's hit album entitled "The Joshua Tree", released in 1987. The second song contains an unauthorized and mutilated instrumental version of "I Still

Haven't Found What I'm Looking For" performed by persons other than U2. As discussed below, defendants' unauthorized use of the foregoing U2 recording and musical composition constitutes infringement of the rights of two of the plaintiffs (as evidenced by Certificates of Copyright Registration issued by the United States Copyright Office) in violation of the Copyright Act.

To prevent the irreparable harm which plaintiffs will suffer from the violation of their rights under the Lanham Trademark Act and the Copyright Act, the defendants should be immediately restrained and enjoined from manufacturing, distributing, selling or otherwise exploiting "U2 Negativland". And, defendants should be required to immediately disclose certain information, discussed below, pertaining to the extent of their infringing activities (and the involvement, if any, by others), and to submit to expedited discovery to permit plaintiffs to prepare for a preliminary injunction hearing without delay.

I, Eric Levine, hereby declare and say as follows:

1. I am the Senior Director of Business Affairs of Island Records, Inc., one of the plaintiffs in this action. I submit this declaration on personal knowledge in support of the motion by plaintiffs, brought on by Order to Show Cause, for a Temporary Restraining Order and Preliminary Injunction to prohibit the defendants from manufacturing, copying, marketing, advertising, promoting, distributing, selling or otherwise exploiting a sound recording entitled "U2 Negativland" (or derivatives thereof) on the grounds that defendants' conduct constitutes a violation of the plaintiffs' rights under, among other things, Section 43(a) of the Lanham Act and the Copyright Act. Plaintiffs also seek certain other relief, including expedited discovery, described below.

2. As set forth in the Complaint (a copy of which is annexed hereto as Exhibit A), and as discussed below in greater detail, since 1980 Island Records, Inc. and its affiliate Island Records Ltd. (and their authorized licensees) have been manufacturing, marketing, promoting, advertising and selling millions of records by the enormously popular recording group known as "U2" in the United States and abroad. The U2 band's name and trademark, "U2", have been prominently displayed on all album packaging, artwork and labels. The public has thus come to recognize and associate the name and mark "U2" with the band and its recordings released by Island Records, Inc., Island Records Ltd. and their authorized licensees.

3. Recently, plaintiffs learned that defendants* released a recording which, on the cover artwork packaging and record label (Exhibit B), is prominently labeled "U2 Negativland". "U2" is the dominant feature of the cover and label.** Defendants have falsely created the impression that "U2 Negativland" is a record album embodying performances by U2. On the face of the cover packaging artwork and labelling, it would appear to any consumer that "U2 Negativland" is a U2 recording, and nothing contained on the cover artwork or label indicates that it is not.

4. Such false and deceptive packaging and labelling is a clear violation of Section 43(a) of the Lanham Act, and the defendants should be restrained for that reason alone. However, as discussed below, the "U2 Negativland" recording also infringes the plaintiffs' copyrights, providing additional grounds upon which to restrain defendants from continued exploitation of "U2 Negativland".

BACKGROUND FACTS

5. Plaintiffs Island Records, Inc. (based in New York) and Island Records Ltd. (based in London) are affiliated companies. For ease of expression, both corporations and their authorized licensees will sometimes be referred to herein collectively as "**Island Records**".

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* Apparantly, SST is a proprietorship owned by defendant Gregory Ginn, and affiliated with defendants Seeland MediaMedia and Negativland.

** The "U2 Negativland" recording is being distributed in interstate commerce. The copy obtained by plaintiffs, which alerted them to defendants' unlawful conduct, was purchased at a record store in Athens, Georgia.

6. Island Records has long been closely associated with the U2 band. Between 1980 and 1986, Island Records manufactured and distributed in the United States and abroad four long-playing albums, so-called "single" records, and two "extended play" recordings, prominently displaying the name and trademark "U2" on packaging, artwork and labels to denote that the recordings embodied the performances of the particular band known as "U2".

7. In 1987, Island Records released the band's album entitled "The Joshua Tree".* That album -- which was clearly labelled with the "U2" name and mark (see Exhibit C hereto, which is a copy of the compact disc packaging) -- was released and distributed by Island Records throughout the world under a master sales agreement which granted Island Records the exclusive worldwide rights to U2's recordings, including the copyright and the exclusive right to use the band's name "U2" in connection with the exploitation of sound recordings.

8. "The Joshua Tree" album was an enormous artistic and commercial success. Island Records, Inc. sold over 5 million copies of that album in the United States alone, all clearly labelled "U2". Indeed, that was the first album in history to have been certified by the Record Industry Association of America

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* As discussed below, SST (and apparently the other defendants) has recently unlawfully copied a portion of U2's recording of the song entitled "I Still Haven't Found What I'm Looking For" from "The Joshua Tree" album, and incorporated that unlawful and unauthorized copy into the "U2 Negativland" recording in violation of the Copyright Act.

as having sold at least one million copies in the "compact disc", or "CD", format.

9. The band's success was enhanced by the release of a single of U2's recording of one of "The Joshua Tree" album's songs -- "I Still Haven't Found What I'm Looking For" -- which was sold throughout the United States and abroad, and received widespread air-play on radio stations and television stations (including MTV).

10. The success of U2's "The Joshua Tree" album and U2's recording of "I Still Haven't Found What I'm Looking For" was highlighted when U2 was awarded a Grammy award on a nationwide award telecast in February 1989.

11. Thereafter, Island Records released throughout the world U2's next album, entitled "Rattle and Hum". That enormously successful album was also clearly labelled as a U2 recording (see copy of packaging for that album annexed hereto as Exhibit D).

12. Recently, numerous publications read by U2's fans, and the music industry trade press, have reported that U2 has completed a new album which will soon be released by Island Records. Annexed hereto as Exhibits E, F and G are copies of a few of the articles that have been published about the anticipated new U2 album. Given U2's enormous popularity, it is inescapable that U2's fans are anxiously awaiting the day when they will find U2's new album in record stores.

DEFENDANTS' INFRINGING ACTS

13. Island Records recently learned that the defendants, under the names SST Records and Seeland MediaMedia, have released a recording entitled "U2 Negativland". It is apparent that defendants are unlawfully seeking to capitalize upon U2's popularity and the anticipation by U2's fans of the release of U2's new album, by packaging and labelling the "U2 Negativland" recording in such a false, misleading and deceptive manner as to confuse consumers into believing that the defendants' recording is a "U2" album, which it is not.

14. As discussed above, Exhibit B hereto is a copy of the cover artwork for the "U2 Negativland" recording in the CD format, and the CD label itself.

15. On the face of the packaging artwork, it appears that the recording is an album by U2. Indeed, the name "U2" is displayed prominently on the cover, and nearly takes up the entire cover artwork. The cover clearly would lead any unsuspecting consumer into believing that SST's recording is a "U2" album, and nothing contained anywhere on the cover artwork or the CD label would disabuse a consumer of that erroneous belief.

16. Indeed, the artwork which appears on the reverse side of the cover, and the label on the CD itself, also fosters

the false impression that "U2 Negativland" is a recording by U2 in at least two ways:

(a) First, the artwork identifies the song on the recording as "I Still Haven't Found What I'm Looking For" -- the same title as one of the songs recorded by U2 on the band's "The Joshua Tree" album.

(b) Second, the inside packaging artwork and the CD label lists in two places the names of the members of U2 -- Paul Hewson, David Evans, Lawrence Mullen and Adam Clayton -- falsely implying that the recording is by U2.

17. There can be no doubt that consumers will be deceived by the "U2 Negativland" artwork into falsely believing that it is a U2 album. Such false and deceptive packaging is precisely the kind of unfair and unlawful competition that Section 43(a) of the Lanham Act was designed to prohibit. Unless SST is immediately restrained and enjoined from further exploitation of "U2 Negativland", unwitting consumers will be duped into purchasing that record in the mistaken belief that it is the new U2 album.

18. The egregious nature of this consumer fraud is underscored by the content of the record itself, which contains only two songs (although the CD is deceptively packaged as an

album, which in the popular record industry ordinarily contains approximately ten songs).

19. The first song is over seven minutes long. It contains approximately one minute's worth of portions of U2's recording of "I Still Haven't Found What I'm Looking For", unlawfully copied from "The Joshua Tree" album and incorporated into the "U2 Negativland" recording without the authorization or consent of Island Records.

20. In that regard, it should be emphasized that Island Records Ltd. is the proprietor throughout the world of the copyright in and to "The Joshua Tree" album, including U2's recording of "I Still Haven't Found What I'm Looking For". Accordingly, Island Records Ltd. obtained a Copyright Registration from the United States Copyright Office for the entire "The Joshua Tree" album. Annexed hereto as Exhibit H is a copy of the Certificate of Copyright Registration for the entire "The Joshua Tree" album as performed by U2 -- SR 78-949. This Certificate establishes, prima facie, that Island Records Ltd. is the copyright proprietor of U2's recordings contained in "The Joshua Tree" album, including U2's recording of the song entitled "I Still Haven't Found What I'm Looking For".

21. The unauthorized copying of a portion of U2's recording of "I Still Haven't Found What I'm Looking For", and incorporation of that recording into "U2 Negativland", constitutes a blatant case of copyright infringement. Under the Copyright

Act, 17 U.S.C. § 101 et seq., such infringement entitles Island Records to, among other things, a restraining order and injunction.

22. Equally outrageous is the content of the second song on the "U2 Negativland" recording. It is replete with expletives, curses and scatological language which many consumers will likely find offensive, and which will undoubtedly anger and upset parents of youngsters who purchase the "U2 Negativland" record.

23. It must be emphasized that U2 has cultivated a clean-cut image, and its recordings never include such language. The band's image will be tarnished, and the name and mark "U2" and the goodwill associated with it, will be substantially harmed as a result of defendants' deception which will lead consumers to purchase what they believe to be a U2 album, only to find a recording containing such lyrics.

24. "U2 Negativland" gives every indication that it is a U2 album, and there is nothing in the artwork or otherwise which indicates that that is not the case. Thus, some unwitting consumers, upon purchasing and listening to the "U2 Negativland" recording, might well conclude that U2 has made a poor quality and offensive recording, thus further unlawfully tarnishing the band's reputation and image, and the enormously valuable "U2" name and mark. This would undoubtedly diminish future sales of U2 recordings, to the detriment of both U2 and Island Records.

THE REQUESTED RELIEF

25. Plaintiffs have demonstrated a clear right to the injunctive relief which they seek in this action. There can be no doubt that the packaging, artwork, labeling and text employed by the defendants create the overwhelming impression that "U2 Negativland" is a recording by U2. There also can be no doubt that consumers will be confused by the prominent use of the name and mark "U2" on "U2 Negativland", and that the confusion and deception will be enhanced by defendants' use of the names of the members of U2 and the title of their hit song "I Still Haven't Found What I'm Looking For".

26. This strong showing of deceptive labeling and likelihood of confusion, compounded by a clear case of copyright infringement, establishes that plaintiffs will likely prevail on the merits.

27. Moreover, the balance of hardships tips decidedly in favor of the plaintiffs and against the defendants. If the requested injunctive relief is not granted, the defendants will be free to flood the shelves of record stores with the infringing recording on the eve of the release by Island Records of the new U2 album, thereby creating massive confusion among the record-buying public. Once the "horses" are out of the "barn door", the harm to Island Records will be done, and will be irreparable.

WHEREFORE, plaintiffs demand judgment against defendants, jointly and severally, as follows:

(1) Preliminarily and permanently enjoining and restraining the defendants, their officers, directors, agents, servants, employees, subsidiaries, affiliates, assigns, licensees, distributees, attorneys and all persons in active concert or participation with them or in privity with them from (a) manufacturing, distributing, promoting, advertising, marketing, selling or otherwise exploiting the sound recording entitled and labelled "U2 Negativland" or any derivatives thereof, or otherwise affixing or utilizing the name and mark "U2" in connection with any goods or services furnished by or on behalf of defendants or any of them; (b) suggesting or implying that any of defendants' goods or services are associated with, sponsored by or otherwise authorized by plaintiffs and/or the performing group known as U2; and (c) manufacturing, copying, recording, distributing, promoting, selling or otherwise exploiting the sound recording and musical composition entitled "U2 Negativland", or any derivatives thereof, or any other sound recording or musical composition embodying any portion of the sound recording by U2 and musical composition entitled "The Joshua Tree", including "I Still Haven't

Found What I'm Looking For", or otherwise infringing the respective copyrights of Island Records Ltd. and Warner/Chappell.

(2) Awarding damages to plaintiffs due to defendants' violation of Section 43(a) of the Lanham Trademark Act in such amounts as may be determined by the Court, the amounts to be trebled in accordance with 15 U.S.C. § 1117, together with such punitive damages and trebled damages where authorized under applicable state law;

(3) Statutory damages under the Copyright Act of 1976, as amended, 17 U.S.C. § 504, for defendants' willful copyright infringement.

(4) Requiring defendants to account for all copies of "U2 Negativland" and all derivatives thereof manufactured, distributed, sold and/or otherwise exploited by or on behalf of defendants, their officers, directors, agents, servants, employees, subsidiaries, affiliates, assigns, licensees, distributees and all persons in active concert or participation with them or in privity with them;

(5) Requiring defendants to account for and pay over to plaintiffs all revenues derived from defendants' activities set forth above, received by or payable to defendants, their officers, directors, agents, servants, employees, subsidiaries, affiliates, assigns, licensees, distributees, and all persons in active concert or participation with them or in privity with them, the

amounts thereof pertaining to violations of Section 43(a) of the Lanham Trademark Act to be trebled in accordance with 15 U.S.C. § 1117;

(6) Directing defendants to recall and withdraw "U2 Negativland" and all derivatives thereof from all radio stations and clubs, and from sale or distribution, and to deliver to the plaintiffs to be impounded during the pendency of this action, and for destruction thereafter, all copies of "U2 Negativland" and all derivatives thereof in all formats;

(7) Directing defendants to deliver to plaintiffs to be impounded during the pendency of this action, and for destruction thereafter: (a) all inventory of "U2 Negativland" and all derivatives thereof in all formats; (b) all advertising, sales, promotional packaging, labelling, and other materials, in connection with the distribution, sale or other exploitation of "U2 Negativland" in any media; and (c) all devices for manufacturing copies of "U2 Negativland" and all derivatives thereof, including, without limitation, all lacquers, plates, molds, masters, stampers and tapes in defendants' possession, custody or control;

(8) Directing defendants to publish in Billboard Magazine and other trade publications to be determined by the Court, a prominent announcement that it has withdrawn and recalled "U2 Negativland" and all derivatives thereof, and requesting the

withdrawal of all copies of "U2 Negativland" and all derivatives thereof from play lists and store shelves;

(9) Awarding plaintiffs the costs of this action and reasonable attorneys' fees under the Lanham Trademark Act, the Copyright Act of 1976, as amended, and other applicable laws and rules; and

(10) Awarding plaintiffs such other and further relief as the Court deems just and proper.

Dated: Los Angeles, California
September 3, 1991

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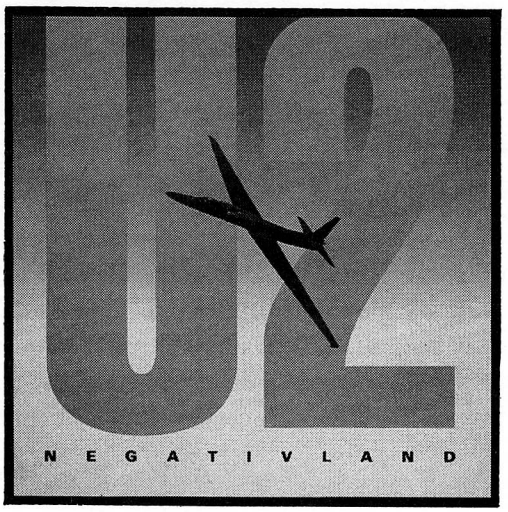
3. Negativland's First Press Release, November 10, 1991

U2 NEGATIVLAND

THE CASE FROM OUR SIDE

Negativland is a small, dedicated group of musicians who, since 1980, have released 5 albums, 4 cassette-only releases, 1 video, and now a single. This single, which is entitled "U2", was created as parody, satire, social commentary, and cultural criticism. As a work of art, it is consistent with, and a continuation of, the artistic viewpoint we have been espousing toward the world of media for the last ten years.



Island Records and music publisher Warner-Chappell Music, presumably acting on behalf of their group U2, have instigated legal action against our single and have succeeded not only in removing it from circulation, but ensuring that it cannot ever be released again. It is clear that their preference is that the record never even be *heard* again. The terms of the settlement that was forced on us include:

- Everyone who received a copy of the record– record distributors and stores (6951 copies), and radio stations, writers, etc. (692 copies)– is being notified to return it, and that if they don't do so, or if they engage in "distributing, selling, advertising, promoting, or otherwise exploiting" the record, they may be subject to penalties "which may include imprisonment and fines". Once returned, the records will be forwarded to Island for destruction.
- All of SST's on-hand stock of the record, in vinyl, cassette, and CD (5357 copies total), is to be delivered to Island, where it will be destroyed.
- All mechanical parts used to prepare and manufacture the record are to be delivered to Island, presumably also for destruction. This includes "all tapes, stampers, molds, lacquers and other parts used in the manufacturing", and "all artwork, labels, packaging, promotional, marketing, and advertising or similar material".
- Our copyrights in the recordings themselves have been assigned to Island and Warner-Chappell. This means we no longer own two of our better works.
- Payment of $25,000 and half the wholesale proceeds from the copies of the record that were sold and not returned. We estimate the total cost to us, including legal fees and the cost of the destroyed records, cassettes, and CDs, at $70,000– more money than we've made in our twelve years of existence.

Our single deals, in part, with our perception of the group U2 as an international cultural phenomenon, and therefore particularly worthy of artistic comment and criticism. Island's legal action thoroughly ignores the possibility that any such artistic right or inclination might exist. Apparantly Island's sole concern in this act of censorship is their determination to control the marketplace, as if the only reason to make records is to make money.

This issue is not a contest among equals. U2 records are among the most popular in history: *The Joshua Tree* sold over 14,000,000 copies. Negativland releases usually sell about 10,000 to 15,000 copies each. Our label, SST Records, is a relatively small, independent label interested in alternative music. Neither of us could afford the tremendous costs involved in fighting for our rights in court. Island could. What we *can* do is try to bring as much publicity and attention to Island's actions as possible. This statement, we hope, is a more humane attempt at reasonable discourse about artistic integrity and the artless, humorless legalism that controls corporate music today.

We've included a small sampling (excuse the expression) from the large stack of legal documents that arrived from Island's attorneys dripping with the unyielding intimidation of money and power. That preliminary stack of documents, 180 pages in all, cost Island approximately $10,000 to produce (they ultimately spent over $55,000 to stop us). Preferring retreat to total annihilation, Negativland and SST had no choice but to agree to comply completely with these demands.

Companies like Island depend on this kind of economic inevitability to bully their way over all lesser forms of opposition. Thus, Island easily wipes us off the face of their earth purely on the basis of how much more money they can afford to waste than we can. We think there are issues to stand up for here, but Island can spend their way out of ever having to face them in a court of law. So some important ideas about what constitutes art, and whether those ideas can superceed product constraints, will not reach a forum of precedent. In this culture, the market rules and money *is* power. They own the law, and no one who is still interested in the supremacy of a vital and freewheeling art can afford to challenge this aspect of our decline. It is a telling tribute to this culture corporation's crass obsessions that Island's whole approach to our work automatically assumed its goal was to siphon off their rightful profits. These people lost their ability to appreciate the very nature of what they're selling a long time ago.

As you will notice from the accompanying legal documents, Island is able to bring certain existing laws to bear against our work under the assumption that any infringement of those laws is done for purposes of diverting their monetary return. Our question is: how and why should these laws apply when the infringement is not done for economic gain? For the law to claim that this alleged motive is the sole criterion for legal deliberation is to admit that music, itself, is not to be taken seriously. Culture is more than commerce. It may actually have something to say about commerce. It may even use examples of commerce to comment upon it. We suggest that the law should begin to acknowledge the artistic domain of various creative techniques which may actually conflict with what others claim to be their economic domain. Any serious observer of modern music can cite a multitude of examples, from Buchanan and Goodman's humorous collages of song fragments in the 50's to today's canonization of James Brown samples, wherein artists have incorporated the actual property of others into their own unique creations. This is a 20th century mode of artistic operation that is now nothing short of dramatic in its proliferation, in spite of all the marketplace laws designed to prohibit it. We believe that art is what artists do. We hope for laws that recognize this, just as the dictionary recognizes new words (even slang) that come into common usage.

At this late date in the mass distribution of capturing technology (audio tape recorders, samplers, xerox machines, camcorders, VCRs, computers, etc.) there should be no need to prove the cultural legitimacy of what we do with sound. And this is even more obvious when you look further back. We pursue audio works in the tradition of found-image collage which originated in the visual arts– from Schwitters and Braque to Rauschenberg and Warhol. In music, we refer you to the whole histories of

folk music and the blues, both of which have always had creative theft as their modus operandi. Jazz and rock are full of this too. The music business can try to reach the end of this century pretending that there is something wrong with this, or they can begin to acknowledge the truth and make way for reality.

Perceptually and philosophically, it is an uncomfortable wrenching of common sense to deny that once something hits the airwaves, it is literally in the public domain. The fact that the owners of culture and its material distribution are able to claim this isn't true belies their total immersion in a reality-on-paper. Artists have always approached the entire world around them as both inspiration to act and as raw material to mold and remold. Other art is just more raw material to us and to many, many others we could point to. When it comes to cultural influences, ownership is the point of fools. Copycats will shrink in the light of comparison. Bootlegging exact duplicates of another's product should be prosecuted, but we see no significant harm in anything else artists care to do with anything available to them in our "free" marketplace. We claim the right to create with mirrors. This is our working philosophy.

Negativland occupies itself with recontextualizing captured fragments to create something entirely new– a psychological impact based on a new juxtaposition of diverse elements, ripped from their usual context, chewed up, and spit out as a new form of hearing the world around us. One of Negativland's artistic obsessions involves the media, itself, as source and subject for much of our work. We respond (as artists always have) to our environment. An environment increasingly filled with artificial ideas, images, and sounds. Television, billboards, newspapers, advertisements, and music/muzak being blasted at us everywhere we go (and that background hum of everyday life certainly includes top forty bands like U2). We follow our working philosophy as best we can amid the proprietary restrictions of a self-serving marketing system that has imposed itself on culture. In reality, that system of ownership is today's emperor's clothes, now casually subverted by every kid with a tape recorder. However, it is crucial to note that, as we plunder the ocean of media we all swim in, we believe in artistic responsibility. We do not duplicate existing work or bootleg others' products. We believe every artist is due whatever rewards he or she can reap from his or her own products. The question that must rise to the surface of legal consciousness now is: at what point in the process of found sound incorporation does the new creation possess its own unique identity which supercedes the sum of its parts, thus gaining artistic license?

One of Island's objections to our record is the unauthorized use of a sample from the U2 song that formed the basis for both of our pieces: *I Still Haven't Found What I'm Looking For.* We believe that what we did is legally protected fair use of the segment, as it was used for purposes of fair comment, parody, and cultural criticism, which the copyright law specifically allows. A relevant precedent was set earlier this year in 2 Live Crew's *Pretty Woman* case. The fact is that today there is no operationally workable way to reuse existing sound recordings in collage-based work and see that the original artists are paid for the use of their work. Those artists who only use a few samples and have the time, money, and inclination can have their record companies negotiate payments for "sampling clearances" to the labels that originally released the records containing the desired snippets. But this is cumbersome, arbitrary, and expensive enough to discourage advanced sound collage work where there might be anywhere from one to a dozen found sound elements present at any instant, dozens or hundreds over the duration of a record.

So much for content. It is clear that the more significant objection to our single was Island's concern about our cover graphics, which they claimed would cause "massive confusion," resulting in millions of U2 fans buying the wrong record. Does our packaging look like a new release by the group U2? *Yes, of course it does...*at first. But upon closer inspection it reveals itself to be something else. Closer inspection is one of the things we like to promote, while Island appears resigned to the entrenchment of stupidity and the inability of their audience to notice subtle cues such as our name on the cover or our label's logo on the back.

Further, the context in which any potential confusion would take place is a retail record store. The first clue to record store employees would be that our single arrives from SST, not Island, and in small quantities, not the hundreds Island would send. Ours would be located in the "Indies" bins common to most outlets, not the general "Rock" bins where U2 records are found. Ours would be filed under "N," not "U". These logistics aside, let's assume someone does buy our record thinking it's theirs. Does Island really believe that the U2 fan will be satisfied with such a mistake and, returning ours or not, not proceed to buy U2's new record? Accusing us of trying to make money off their name is one thing, but claiming that the money we would make would be money they would not make is not very realistic. Island's inference that U2 fans might actually assume that we are them upon hearing our record is simply ridiculous on the face of it, and another indication of their lack of respect for their own audience.

As to Island's point about scheduling our single to coincide with U2's new release, we must plead to interesting coincidence. Island should come to grips with the fact that not everybody in the world avidly soaks up every promo blurb that Island feeds to the mainstream rock press. We don't generally read that press and neither knew nor cared that U2 was about to release another chart-busting epic. Our single was scheduled for fall release because our market stems primarily from college radio airplay, and that's when school resumes and the listening population is largest. Fall is also a prime time to release throughout the record industry, which is probably why U2's new record was also scheduled for fall. It seems clear that both Island and SST were attempting to take advantage of the same situation, not each other.

So why would we want to simulate a U2 cover if not to swipe some of the big money that this big band attracts? Our real reasons are actually so reflective that they would never cross the corporate legal mind. The image on our cover was U2's namesake, the U-2: a high-altitude espionage plane which, prophetically enough, was shot down over the now-defunct Soviet Union in 1960 causing a huge, meaningless international flap. The only point of light in those dark days was that it gave a self-righteous and complacent America its first clear photo opportunity to catch its own president telling a blatant lie which the CIA assured him was plausible deniability. Our U2 was a spy full of secrets intruding into the self-righteous and complacent image-world of polite pop. We did it as an example of something not being what it seems to be. We did it because we're all subject to too much media image mongering. We did it because tricksters and jesters are the last best hope against the corporate music bureaucracies of good grooming that have all but killed the most interesting thing in popular music– grassroots inspiration. We did it for laughs– listen to it and try not to. We did it so you could read this. The fact that Island Records can't understand all this, or if they can understand it they can't appreciate it, or if they can appreciate it they can't allow themselves to acknowledge it, is precisely why they should not have the right to control the life of other people's art.

One basic failing of the U.S. legal system is that it treats the plaintiff and the defendent as though they are equally powerful entities, regardless of the actual resources each may have. Further, it disregards the fact that the cost of preparing a legal defense for a trial is prohibitively high– unthinkable for any entity other than a wealthy individual or a good-sized corporation. Thus, when a corporation goes after a small business or low-income individuals, the conflict automatically rolls outside of the court system because of the defendent's inability to pay the costs of mounting a proper defense. The matter is resolved by the more powerful organization threatening to press the suit back into the courts unless the smaller party agrees to their terms unconditionally. The powerful crush the weak. Note that all of this is purely a *power* relationship, essentially without regard to the legality of the issue, let alone the morality.

What would be the solution to prevent the cruel squashing of interesting jokes such as ours? How about a thorough revamping of the antique copyright, publishing, and cultural property laws to bring them into comfortable accord with modern technology and a healthy respect for the artist's impulse to incorporate public influences? Marketer's constraints should be restrained in cases of valid artistic commentary. This is a huge and complex Congressional undertaking and would inevitably result in sticky legal decisions akin to deciding whether or not a particular work of art is pornographic. So be it.

Art needs to begin to acquire an equal footing with marketers in court. We can even imagine such changes extending all the way to recording contracts which, strange as it may seem, might actually be written so as to allow the artist, rather than the marketer, to own and control his or her own work. You might as well start thinking about these problems now because they're not going to go away.

Red China's exhibit of shot-down U-2s

For years the U.S. has been letting Nationalist China have U-2 spy planes for reconnaissance over Red China. Now the Peking regime offered evidence of its growing ability to shoot them down from their high-altitude flights with, it added, their Nationalist Chinese pilots. The reassembled remains of four U-2s went on display in Peking before lines of gawking people amidst a Communist propaganda barrage.

4. "Agreement" that SST Demanded Negativland Sign (Refused)

Mark Hosler, Don Joyce, Richard Lyons, Chris Grigg
a/k/a Negativland

Re: SST Records et. al. adv. Island Records, Ltd. et. al.
Case Number: 91-4735AAh (GHKx)

Dear Mark, Don, Richard and Chris:

1. Pursuant to the agreement between you and us dated September 10, 1990, you delivered to us master recordings, packaging, label art work and text for a phonograph record entitled "U2 Negativland".

2. We caused the copying and manufacturing of the sound recording entitled "U2 Negativland" commencing on or about _____, 199___.

3. On or about September 3, 1991, Island Records, Ltd., Island Records, Inc., Warner Chappell Music International, Ltd. and Warner Chappell, Inc. (collectively referred to as "Plaintiffs) filed an action ("Action") against you and us seeking to enjoin the release of "U2 Negativland" and, further, seeking damages against you and us.

4. We have agreed, on your and our behalf, to enter into a settlement agreement with the Plaintiffs in connection with the Action. We have agreed to pay damages to Island Records, Inc. and Warner Chappell Music, Inc. In addition to those out-of-pocket payments, we have incurred, and will continue to incur, additional out-of -pocket costs. Said costs include, but are not limited to, attorneys' fees, courts cost, cost associated with the recall of "U2 Negativland".

5. You hereby agree to and do hereby indemnify, save and hold us, SST Records and Gregory Ginn, harmless from any and all damages, liabilities, costs, losses and expenses (including legal costs and reasonable attorneys' fees) arising as a result of our release of "U2 Negativland", and, further, agree that we shall have the right to recoup any payment made by us in connection with the settlement of the Action, including, but not limited to, those costs referred to in the preceding paragraph from any monies payable to you pursuant to the terms of the Agreement. If the foregoing accurately reflects your understanding of our agreement, please so indicate by signing on the line below.

Very truly yours,

SST RECORDS

By:_____
Gregory Ginn

Its:_____

ACCEPTED AND AGREED TO:

By:_____
Mark Hosler

By:_____
Don Joyce

By:_____
Richard Lyons

By:_____
Chris Grigg

5. Negativland's Counterproposal to SST

"If you can't lick 'em, put 'em on with a big piece of tape."

October 31, 1991

Greg Ginn
SST Records
P. O. Box 1
Lawndale, Ca. 90260

Re: U2

Dear Greg–

We've received the agreement you'd like us to sign with you. We understand from Sydney that you don't want to entertain any other possible scenarios, but we have some changes to propose. We acknowledge our partial responsibility in this whole affair, and have no intent or desire to weasel out of this situation. You are also partly responsible for it because you knew that the record was almost certainly an infringement when you got it, but you decided to put it out anyway. You could have avoided liability by refusing to release the record or insisting on changing the cover, but you didn't.

The agreement as you propose it has several problems for us, and we have been repeatedly advised not to sign it. It is essentially a guarantee that we will pay you anything you ask for, for any reason, forever. There is no description of how you will determine the figure to be paid, no guarantee that the figure is fair, and no provision for determining the point at which you will stop retaining the royalties. It does not prevent you from also suing us if for some reason you decide to, and it does not protect us from future liability in case you do anything to break the Island agreement and they sue both of us again.

But the most troublesome part of your proposed agreement is that you don't want to pay any part of the costs involved. This is plainly unfair, and frankly outrageous as well. As you mentioned to Don and Chris on the phone, you knew what you were getting into with this record, and as you've pointed out to us on several occasions, it's SST as a record company who takes the greatest financial risk in releasing records. Doing business at your scale does involve risk, and it's your responsibility to protect yourself.

But we do acknowledge that as the creators of the work we share responsibility for this suit, and we're freely willing to pay for it. What we propose is a simple 50-50 split. We made it, you released it. We agree with your plan to collect the money from our royalties until the amount is paid off– that's a natural and sensible mechanism, especially given the fact that our royalty stream is in fact the only way we have to pay you. However, we need to see that the process is properly accounted for, and we need you to agree not to sue us in addition to recouping from royalties. The last page of this letter spells out these changes we want to see in the agreement you proposed. We are eager to sign a modified agreement with you as soon as possible, and then both SST and Negativland could get on with our lives. Too much time has been wasted.

In closing, we're just individual artists, but we're willing to contribute our entire $1 per record to this thing, which will probably take the next four years. We think you, as a successful company with a larger profit margin on those same records, ought to be willing to match that, dollar for dollar. You'll still be making money. And please remember that paying half the costs is going to hurt us a lot more than it'll hurt you– we won't see any royalty money, on which we depend for the group's continued operation, literally for years. How would *your* life– not to mention your art– change if you lost your royalties for years to come? We're willing to make that sacrifice to make this thing right. What will you do?

We'll wait to hear from you. Please discuss this with your lawyer, and please consider the situation carefully.

–Negativland

Negativland's Proposed Changes To SST Agreement

4. (same as SST's version, except add an accounting of all known actual expenses to date [Sidney says she's working on something like this], and an outline of anticipated future areas of expense, with caps)

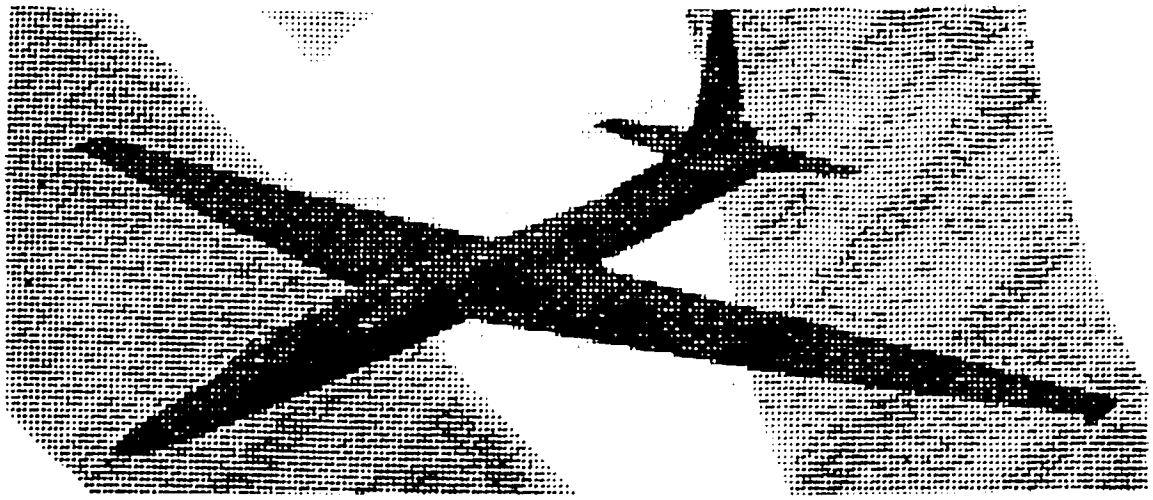
5. (changed) In acknowledgement of their partial responsibility in this matter, Negativland will share in the cost as follows. SST shall deduct monies due to Negativland under the Agreement between SST and Negativland (dated September 10, 1990) from Negativland's biannual SST royalty payments until these contributions total to 50% of those costs identified in paragraph 4. This recoupment process will be SST's only mechanism for collecting from Negativland costs related to the Action. SST agrees not to litigate to collect such monies.

6. (new item) SST agrees to provide periodic financial statements regarding this matter to Negativland not fewer than twice annually, specifying for the period: 1) the amounts contributed by Negativland under this agreement, 2) any new costs incurred by SST as a direct result of the Action, and 3) the amount remaining to be recouped. SST also agrees to provide Negativland or its authorized representative(s) access to review supporting documentation, upon their request, at reasonable times during normal business hours, for the purpose of determining the accuracy of these financial statements. This shall include the right to examine, or to receive periodic copies of, financial statements documenting those payments made by SST to Plaintiffs.

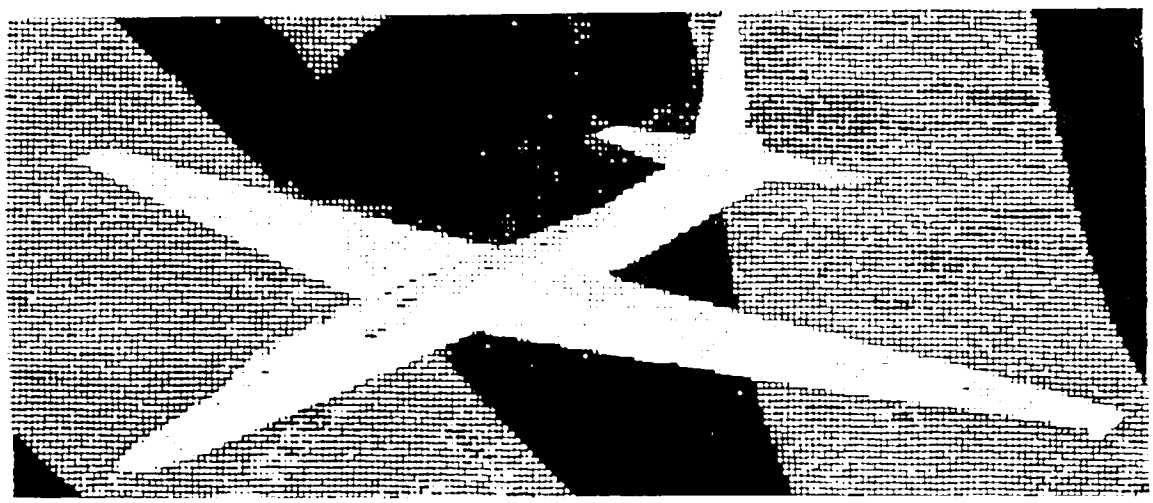
7. (new item) Negativland's obligations under this agreement are subject to SST's fulfillment of its obligations under the release agreement with Plaintiffs.

SATURDAY, OCT. 26TH 7-10PM

633 HAIGHT at STEINER



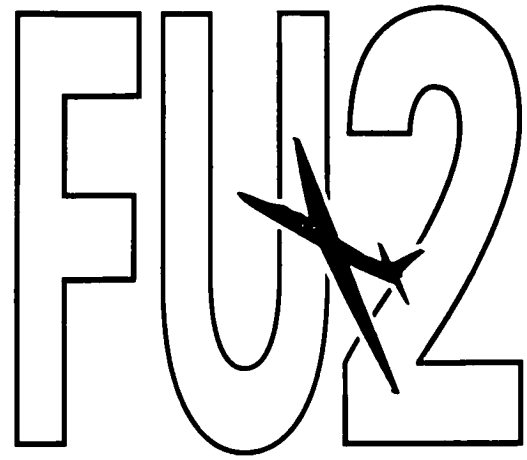
HERE IS YOUR CHANCE FOR AN OBNOXIOUS AND APPROPRIATE RESPONSE TO CORPORATE MUSIC GREED.



FREE OF CHARGE, WE WILL SCREENPRINT THE COVER IMAGE OF NEGATIVLAND'S STOLEN RELEASE U2 ON YOUR BLANK SHIRT. TAPES OF THE RECORDING WILL BE DUBBED.

ISLAND RECORDS CAN SUE US.

THEY F-ed NEGATIVLAND
THEY F-ed JOHN OSWALD
. . . AND THEY COULD



"TRIBUTE" compilations are much too everywhere. We are in the unique position of assembling an underground compilation of what **should** be described as **the ANTITHESIS of a "tribute,"** a collection of **U2 demolitions.** **"WHY U2" you ask?**

• In protest of the corporate/legal **BULLYING** of experimental music group **NEGATIVLAND** by rock group **U2's** label, **Island Records** and publisher **Warner-Chappell.** Negativland's recording, "U2" was intended as satire, social commentary, and cultural criticism. The music industry has no moral qualms about "F"-ing independent musicians: The out-of-court settlement, legal fees, plus the cost of the destroyed recordings leaves Negativland with a bill of $70,000 - more than they have earned in the 10 years of their existence. (See attached reprint for more details.) Recall the bullying that Toronto musician **John Oswald** was subjected to over his ***Plunderphonic*** project.

This compilation will be strictly non-profit, will be sold for the **cost/trade of a blank audiocassette** + postage, if applicable. Bootlegging will be **more** than encouraged, it will be **strongly recommended.** We intend to supply copies to radio stations and publications that support independent music. We have no commercial intent - we simply want to assert our opposition to the kind of corporate **POWER-TRIPS** we have just described.

We invite you to **massacre, fold, spindle and mutilate** a **U2** song of your choosing, record it on any available recording device (recording quality and production values are not as important as the level of disrespect you show for the song!), and submit it to us by **MID-DEC. '92** for release around **X-mess** or the new year. *If you have no access to recording possibilities, we may be able to attend a performance/practice and record you live to DAT.* You are encouraged to use your actual band names, but we will quite understand if you want to use a pseudonym. Try for chrome cassette or DAT masters. **STUPIDLAND: (416) 588-0705**

BE SPONTANEOUS AND UGLY. DO NOT DELAY!

THIS IS NOT A TRIBUTE - THIS IS WAR!

6. Fax from Brian Eno, U2's Producer

ATTN. NEGATIVLAND

c/o OPAL 330 Harrow Road London W92HP

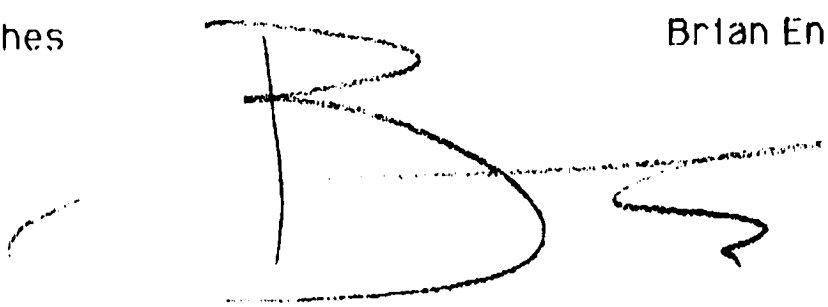
Dear Negativland,

thanks for your letter. I'll mention it to Bono when I speak to him, which should be in the next few days - though by now he might have heard about it independently. I'm pretty sure that the band wouldn't support this rather heavy-handed interference in what you're doing: apart from anything else, their senses of humour and self-deprecation are completely intact, and I think they'd probably find the original record pretty funny.

Of course, you should realize that they don't *control* Island Records or Warner Chappell, and it might be the case that this thing has now acquired a momentum that is hard to stop (without serious losses of face, that is). So don't be too surprised if the whole thing winds down very slowly and with numerous face-saving compromises and loudly rattling sabres.

I haven't had the pleasure of hearing your song yet, but no doubt I will. Meanwhile, I really enjoyed reading the text you sent - maybe that in itself justifies the whole episode...

Best wishes Brian Eno



7. Fax from Chris Blackwell, President of Island Records

ISLAND RECORDS LTD
22 St Peters Square
London W6 9NW
Tel: 081 741 1511
Cables: Ackee
Telex: 934541
Fax: 081 748 1998

19th November 1991

Negativland

Oakland
California 94618
U.S.A.

Re: "U2 NEGATIVLAND"

I have been getting a huge amount of hastle from the members of U2, not to press for payment.

It has cost us US$55,000 at least, to pursue this claim which could have been avoided in the first place if you had phoned or written a letter to the manager of the band or myself, when you were contemplating the release.

At this point I am not prepared to eat these legal fees. I'm sorry.

Yours sincerely

CHRIS BLACKWELL

"...I am <u>not</u> prepared to eat..."

8. Negativland's Response to Chris Blackwell

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

November 20, 1991

Chris Blackwell
Island Records Ltd. London
via fax: 081-741-0369; hard copy via Federal Express

Dear Mr. Blackwell,

Thank you for your personal communication with us. It is refreshing and so much more useful than having attorneys talk for us. We hope you're still able to enjoy a frank discussion of this whole U2/Negativland situation and will take a little time to consider the following. When something gets big enough, its very size becomes a funny thing (American TV's *Entertainment Tonight* just ran a piece announcing that record stores here are requiring record buyers to sign up in advance to buy *Achtung Baby!* The lines to do this ran way down the block.). You guys have your fingers in a lot of brains, so be careful.

Corporately promoted culture is a legitimate target for satire and practical jokes. For you to maintain that we needed your permission to parody you is wrong. We don't believe parody would survive if it were made subject to prior approval by the subject. "Then take the consequences," you may say. We certainly have, but you must also now be becoming aware that there are consequences for you too. And U2. It seems we aren't the only ones inclined to cast a disrespectful eye in your direction. Every single publication, large and small, who have discussed the case so far seems to sympathize with us (see *Spin, LA Daily News, Village Voice, Melody Maker, Billboard, Chicago Tribune, Boston Herald, Washington Post, New York Times, San Francisco Chronicle, Contra Costa Times,* etc.). These sympathies have to do with the way you (and all of your corporate competitors) are generally perceived as control freaks. Control the image. Control the market. Control the music. In our case, you have tried to control all three and now, as the attorneys walk away with all that money, Island and U2 are left appearing to be rather humorless and insensitive overkillers. No one can listen to our record without a chuckle, and this should have been your first clue to lighten up. Did anyone there even listen to our record before initiating this legal action?

We make no apologies for the audio content of our record. It was painstakingly conceived and constructed. It is our best work to date and now, thanks to you, it becomes legendary (see latest issue of *Spin*). However, you really wasted that money if, as we suspect, our cover was your main concern. The cover was certainly a deceptive act on our part, but we would have gladly recalled the record and changed the cover on your simple demand. Going directly to court with your massive response was wholly inappropriate given the relatively miniscule size of our operations. A single letter or phone call from your attorney could have sufficed, would have saved you the legal fees, and would have allowed us to go on selling it to make the meager living that we do. As it is, our label, SST, has demanded that Negativland be liable for the entire amount of damages you will collect ($25,000 in damages and about $15,000 for half the wholesale price of the records that were sold). Since none of our 5 albums have sold more than 15,000 copies, and since SST is also charging us for their additional legal fees and the manufacturing costs of the 6000 copies still in their warehouse ($63,000 total)– all to come out of our future royalties– we are now left without income for approximately 6 years to come. Obviously this deficit will make creation of new works much, much more difficult. For the moment, Island has succeeded in completely crushing our art and our livelihood.

1920 MONUMENT BOULEVARD #E-11 CONCORD CA 94520 510-1420-10469 FAX

Mr. Blackwell, if this is truly not quite the role you envision for yourself, words are not going to do the trick of turning it around. From your point of view, we think it might actually be possible to turn bad publicity into good with a few unexpected, creative acts. Here are a few suggestions you might consider which would benefit everyone (except the lawyers).

1. According to the settlement agreement, you now own the copyright on our U2 single. Interest in hearing it is growing dramatically. We could change the cover to your satisfaction and you could release it. You could use all the profits– and even royalties and mechanicals would be payable to you– to recoup your legal fees, in lieu of pressing for the settlement payment. Once your costs are recouped, you could pay us the standard mechanicals and royalties.

2. If Side 2 of our single is just too hairy, you could release Side 1 as the B-side of a U2 single. This idea was facetiously suggested by Paul McGuiness but, taken seriously, it's pretty interesting because it also directly eliminates any stigma of censorship that would otherwise cling to U2 after this affair. Why don't you ask them?

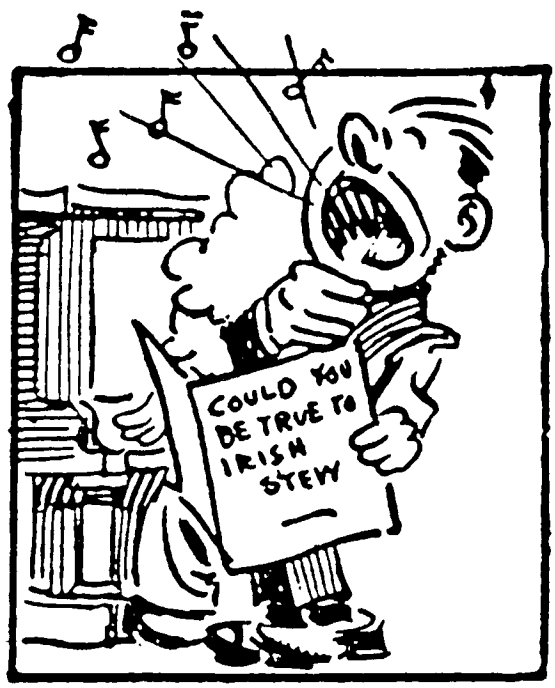
3. Call off this settlement entirely, and allow SST to continue selling the record in its present form, but paying all royalties to you instead of us– on the condition that a huge sticker, of your design, appear on the cover: "This Is Not A U2 Record" or whatever.

Perhaps you can think of variations on these ideas, but you can see how something along these lines could serve to pay off the legal expenses you've incurred, keep the work from disappearing in a way sure to be seen as censorship, show Island, U2, and Negativland to be working together after a brief misunderstanding, and keep us from going bankrupt.

Interestingly enough, it happens that the lawyer SST hired to deal with the Island suit is going to be in London next week on other business. We must admit that we don't like dealing through lawyers, but he has offered to see you while he's in the UK and go over any details of our proposal you might care to discuss with him. If you would like to talk with him, please respond to us shortly. If, on the other hand, you decide to let matters lie where they are, we will not.

Thanks again for contacting us. Now let's have some fun.

–Negativland



9. Fax to Dermott Hayes, Irish Music Writer and Friend of U2

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

December 5, 1991

Dermott Hayes
fax Dublin 284-0473

Dear Mr. Hayes,

Thank you for your fax, your compliment on our record, and for the thought you've apparently put into this matter. Per your request, a copy of Chris Blackwell's fax to us follows, as does a copy of our response to him. We have not heard back from Mr. Blackwell, and despite several attempts to speak with him or his assistant in London, have been unable to determine whether he has actually received our reply (sent via fax twice, plus Federal Express). There is an issue of time in this, as the settlement has now been signed by all parties except the judge, and all that now remains is the payment.

Although Mr. Blackwell's fax says that the members of U2 have been after him to show mercy to us, we haven't heard that information from the band themselves. Perhaps we have become too cynical regarding Island, but if you've spoken to Bono and he hasn't mentioned any effort on U2's part to sway Mr. Blackwell, then perhaps his fax to us was not a sincere communication, and instead an attempt to draw any potential criticism to Island rather than U2. Since you're in contact with the group, you can check this with them.

We appreciate your contacting us directly, and hope you will do so again if you have further questions. And if your investigations turn into a story, we'd love to read it.

–Negativland

1920 MONUMENT BOULEVARD #E-U CONCORD CA 94520 510-420-0469 FAX

10. The Court's Final Judgement, Order, and Decree

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ISLAND RECORDS LTD. (a United Kingdom Corporation), ISLAND RECORDS, INC. (a New York corporation), WARNER CHAPPELL MUSIC INTERNATIONAL LTD., (a United Kingdom corporation), and WARNER/CHAPPELL MUSIC, INC. (a California corporation), Plaintiffs, vs. SST RECORDS (an entity), SEELAND MEDIA-MEDIA (an entity), NEGATIVLAND (an entity), Gregory Ginn (an individual), Chris Grigg (an individual), Mark Hosler (an individual), Don Joyce (an individual), and David Wills (an individual), Defendants.	Case No. CV 91-4735 **FINAL JUDGEMENT, ORDER AND DECREE AS AGAINST DEFENDANTS SST RECORDS, GREGORY GINN, SEELAND MEDIA-MEDIA, NEGATIVLAND, CHRIS GRIGG, MARK HOSLER, DON JOYCE AND DAVID WILLS** DATE: October __, 1991 TIME: PLACE: Courtroom (Judge A. Andrew Hauk)

Upon the Application of plaintiffs and defendants SST Records, Gregory Ginn, Seeland MediaMedia, Negativland, Chris Grigg, Mark Hosler, Don Joyce and David Wills; the supporting declarations of Charles B. Ortner and Michael Blaha, the Settlement Agreement between the plaintiffs and certain of the defendants dated as of October 15, 1991; the Summons and Amended Complaint in this action; the Ex Parte Order to Show Cause Re Preliminary Injunction, Temporary Restraining Order and Expedited Discovery; and it appearing that the plaintiffs and the foregoing defendants consent to the entry hereof.

ORDERED, ADJUDGED AND DECREED as follows:

(a) Defendants SST Records, Gregory Ginn, Seeland

MediaMedia, Negativland, Chris Grigg, Mark Hosler, Don Joyce and David Wills (the **"Settling Defendants"**), the proprietors, officers, directors, employees, and agents thereof, attorneys for said defendents and all those in privity with said defendants or acting in concert or participation with each of them are permanently restrained and enjoined from (i) manufacturing, copying, marketing, promoting, advertising, distributing, selling, or otherwise exploiting in vinyl, audio cassette, compact disc or any other format or medium, the sound recording known as "U2 Negativland", any derivatives thereof [redacted] any other recording denominated by or labelled with the name or mark "U2", and any recordings containing, in whole or in part, any recordings by the musical group known as U2 or musical compositions authored or composed by any of the members of the musical group known as U2 unless under an authorized license; or (ii) otherwise infringing the respective copyright interests of Island Records Ltd. and Warner/Chappell Music, Inc. evidenced by the Certificates of Copyright Registration SR78-949 and Pa 325 821 issued by the United States Copyright Office, or violating the rights of plaintiffs pertaining to the name and mark "U2" under Section 43(a) of the Lanham Trademark Act, 15 U.S.C. §1125(a).

(b) The Settling Defendants shall, at their sole cost and expense, forthwith use their best efforts to recall all copies of "U2 Negativland" and derivatives thereof from all distributors, jobbers, retail outlets, clubs, radio stations, television stations and all other persons or entities to whom defendants SST Records and/or Gregory

Ginn know or have reason to believe received one or more copies of the sound recording entitled "U2 Negativland". In effecting said recall, defendants SST Records and Gregory Ginn shall reimburse all those from whom any copies of "U2 Negativland" are recalled the full purchase price, if any, and all expenses incurred in connection with said recall if any person or entity conditions return of copies of "U2 Negativland" upon such reimbursement.

(c) Defendants SST Records and Gregory Ginn shall, at their sole cost and expense, within five (5) business days from the date hereof deliver up to plaintiff Island Records, Inc. all copies in all formats of the recording entitled "U2 Negativland" and all derivatives thereof; all master recordings, tapes, stampers, molds, lacquers and other parts used in the manufacturing of "U2 Negativland" recordings and all derivatives thereof; all recordings (including but not limited to rehearsal tapes and demonstration tapes) which embody or contain in whole or in part, any version of the works embodied in the recording entitled "U2 Negativland"; and all artwork, labels, packaging, promotional, marketing and advertising or similar materials containing the name or mark "U2", the words "U2 Negativland" or any derivatives thereof, or otherwise created or used in connection with the recording known as "U2 Negativland", in the custody, possession or control of any Settling Defendant as of the date hereof. With respect to any items described in this paragraph which come into the possession, custody or control of any Settling Defendant after the date hereof but on or prior to April 15, 1993, said items shall

within seven (7) business days of their receipt be delivered to plaintiff Island Records, Inc. by United Parcel Service or Federal Express, at said defendant's sole cost and expense. With respect to any [illegible] described in this paragraph which come into the possession, custody or control of any Settling Defendant after April 15, 1993, said items shall be delivered to plaintiff Island Records, Inc. by United States Mail, United Parcel Service or Federal Express, at the end of each calendar month in which said items were received, at said defendant's sole cost and expense. All deliveries hereunder shall be to Island Records, Inc., 14 East 4th Street, New York, New York 10012.

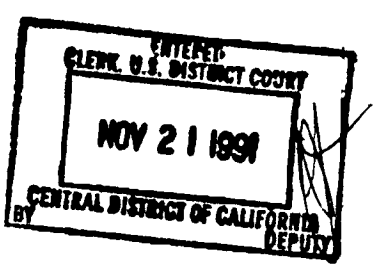
IT IS FURTHER ORDERED that this Court shall retain jurisdiction to monitor and enforce the performance by the Settling Defendants of the provisions hereof and the Settlement Agreement between the parties.

IT IS FURTHER ORDERED that sufficient cause appearing therefor, this action is dismissed without prejudice as against Steve Corbin, Joe Carducci and Gary McDaniel, without attorneys' fees, costs or disbursements.

IT IS SO ORDERED, ADJUDGED AND DECREED.

DATED: 11/15/91

UNITED STATES DISTRICT JUDGE



11. Negativland's Severance Letter to SST

December 11, 1991

Greg Ginn
SST Records
10500 Humbolt St.
Los Alamitos, Ca. 90720

Dear Greg–

After much consideration, Negativland has decided to part company with SST. We were shocked and let down by your expectation that we would pay the entire bill for the U2 damages. We still applaud the fact that you put it out. That's what we wanted. By the same token, your decision to put it out certainly incurs some responsibility for the consequences, as Island clearly indicated in their suit. They held both Negativland and SST equally responsible for this product, and we believe that is the equitable way to pay it off.

This seemed so obvious that your no-discussion demand that we pay the whole amount came as a revelation that we are in business with the wrong people. As business partners, we have the right to expect that we are working together in each other's interest. This situation makes it clear that, when the chips are down, SST will sacrifice its artists for its own gain. We can no longer put our faith behind a company that can turn so unpredictably against the very people they claim to assist.

A while back, we were also perturbed by your no-discussion refusal to even consider rewriting our contract so that it might allow us certain rights of ownership over the work we create. In that instance, you had the opportunity to do something actually revolutionary in the record business– acknowledge the undeniably rational concept that the creator, not the manufacturer, should own the work of art. But, to our dismay, you chose to cling to the irrational status quo, presumably for self-serving reasons.

This is sad because it is an offensive and corrupt status quo common to the whole music business, and your adoption of it distinguishes you little from the rest of the corporate music industry you claim to stand in opposition to. In the *really* crucial areas of how a label commandeers ownership of things they do not create in exchange for short-lived advances, you are no different than they are.

So now we are tired of record labels. Big or small, they all seem uncontrollably habituated to exploitation and taking advantage of anyone foolish enough to give them their hard won work "in perpetuity". From now on we will put out our own records ourselves.

Because of the risks involved in the material we produce, and our particularly obsessive need to control all aspects of our releases, you too may feel that this is the best move we can make. Were we to attempt to swallow this outrageous U2 outcome as we did the contract rebuff, there would only be less trust and more conflict in the future. We don't belong on any label except our own.

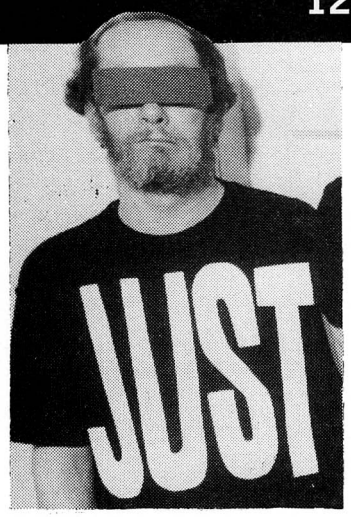
Regarding the $4500 combined partial advance for *Live Stupid* and the *Willsaphone* cassette, it is gone, already spent. Since we will not be sending those works to you, we will have to owe you that. Regarding the U2 damages, we will sign a statement allowing you to recoup half the total amount from our future royalties. We will not sign the statement holding us liable for all of it. If you prefer, you may add the $4500 we owe you to the half of the U2 damages we are willing to pay out of royalties. In any case, we also want to see some verification of the damages total.

Make no mistake at this point of disillusionment. We have done some good things together which we still appreciate, and this parting comes with mixed feelings. It is inconsistency that broke the bond.

No longer yours,

Negativland.

12. Negativland Reviews U2's New Album



THE SAN FRANCISCO BAY GUARDIAN
DECEMBER 18, 1991

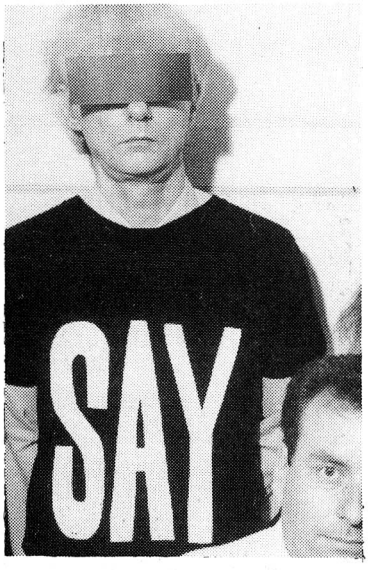
WITH

If the world holds any true *haters* of the band **U2**, common sense says they're in **Negativland**, the band whose brilliant satire of corporate rock got them slapped with a $25,000 lawsuit, an order to destroy all copies of their record, and a loss of nearly $70,000– all courtesy of the letter U and the numeral 2.

But Negativland, unlike U2, has a sense of humor. And since the Irish monolith has already given its opinion of Negativland's latest record, we figured it was only fair if the members of Negativland got equal time. We asked three of them– Chris Grigg, Don Joyce, and Mark Hosler– to put aside their differences with their Irish friends and give a critical listening to U2's new record, ***Achtung Baby***.

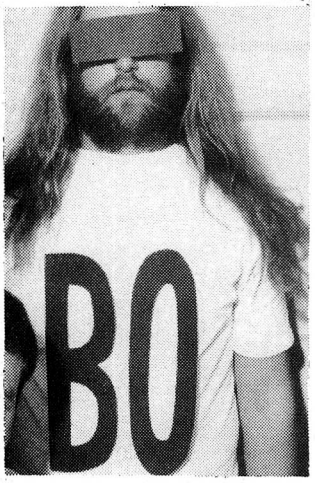
Here's what they thought.

OR



Mark Hosler: Hey, U2! You can swallow, you can spit, you can throw it up, or choke on it… I sort of like this record. Conventional corporate music wisdom tells them to play it safe and stick to their anthemic formula, but on *Achtung Baby*, at least in terms of production and mixing, there are some truly startling moments. The opening track is a wonderful-sounding mess of weird guitar distortions, flanged vocals, sound clouds washing in the background, distorted drums, and a funky rhythm section.

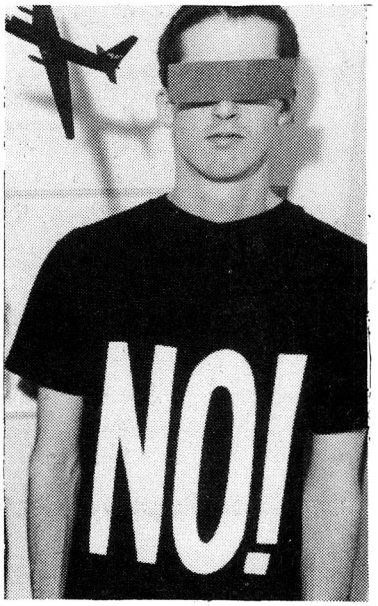
There are other great moments of ear candy on this record, but the embarrassing and uniformly dumb lyrics make it difficult to listen to. Actually, a lot of the sound and "look" of this record (intentionally blurry, overexposed photographs of U2 in sunglasses, leather jackets, cigarettes, beer, and smiles) makes *Achtung Baby* an uncomfortable mix of both new ideas and that contrived old rock'n'roll concept of "Hey man, let's get back to our roots, back to the basics, man– we gotta reach the kids." Let's give them an E for effort. It's more of the same, only different. Or as U2 sez, "It's all right, it's all right, it's all right, it's all right."



WITHOUT

Chris Grigg: "I can't believe I'm doing this," I muttered as the cashier aimed the laser that would ultimately lead to another three bucks' profit for Island Records and cement the already blockbuster numbers that will probably mean a five-figure bonus for [Island Pres.] Eric Levine in Fiscal '91. I mean, even *aside* from this galling contribution to the bloated bottom line of the very organization that suppressed our latest record, what *possible* point can there be in *reviewing a record by U2*, a band found inspiring chiefly by teenagers, college students, murderers, accountants, and corporate litigators, a group *so* entrenched in the mainstream music market machinery that any critical opinion of *Achtung Baby* would be irrelevant? It'll be bought, played on the radio, and listened to with exaggerated attention and in obscene quantities irrespective of its quality, and if a bad review doesn't matter, then neither does a good one.

U(2)



Don Joyce: On *Achtung Baby*, U2's sound is as iconic as ever with never a change of pace. This is brand-name music for brand-loving listeners. There is absolutely nothing wrong here, which means they are doing nothing they haven't done and are going nowhere they haven't gone a hundred times before– just what America needs.

There is emotion here but little to jar you out of the emotional predictability of any U2 song. The beat is big, they soar, they are darkly romantic, they do everything they are supposed to do quite well. I found myself desperately seeking out any kind of sonic aberration. On a couple of cuts they put some high-tech squashing effects on Bono's vocals, and there are some very brief guitar momemts that approach interesting noise, and I like whatever they did to the cymbals in "So Cruel." These points of interest can probably be chalked up to the producers, principally Daniel Lanois and Brian Eno.

All in all, I think corporately manufactured music, of which *Achtung Baby* is a perfectly fine example, now offers practically nothing to the game of life in which we now play by so many outworn formulas. And those addresses for Amnesty International and Greenpeace on the J-card are just public relations until U2 and other groups committed to changing the world begin to turn some serious attention on *their* world– the music business. Both corporate and independent record labels are, after all, planetary sources of cultural inspiration, but they are also the most internally corrupt, exploitative, greedy, cynical, and untrustworthy bunch of attorneys, accountants, and control freaks ever to contractually grab ownership of art they did not create and do not understand. Now there's a subject for a song.

13. SST's *Kill Bono* T-Shirt

14. Negativland's Fax to Island Records and U2 Regarding SST's T-Shirt

"If you can't lick 'em, put 'em on with a big piece of tape."

December 19, 1991

Eric Levine, Island Records, Inc. fax US 212-475-8254
Chris Blackwell, Island Records, Ltd. fax UK 081-748-1998
Paul McGuiness, Principle Management fax Ireland 1-777-276
U2 c/o Principle Management, fax Ireland 1-777-276

Gentlemen,

Sorry to bother you again, but we feel we must let you know that Negativland was *not* involved in SST Records' new 'Kill Bono' promotional campaign. We think it's an inappropriate way for them to deal with this situation, and we were *not* consulted by SST in this matter.

In fact, Negativland has now left SST as a result of their no-consultation decision that Negativland will reimburse SST for 100% of their costs arising from the lawsuit (including the financial settlement, the costs of the surrendered product, SST's legal fees, and charges for SST office personnel's time for dealing with the action), rather than the 50-50 split we proposed to them. Since we can't afford a lawyer to fight SST's blatantly irresponsible and unfair handling of the matter, this means that we have utterly lost our back catalog, and don't expect to see another dime from SST, ever. For you, galling as it may be, this decision means that there is no way to really punish SST, because every dollar you get from them they will now turn around and take from us by intercepting our royalties. If you haven't already received the final financial settlement from SST, we would urge you to consider these facts before doing so.

–Negativland

P. S. to Mr. Blackwell: We've heard from your assistant that you're planning a response to our fax of November 20. We're looking forward to receiving it.

1920 MONUMENT BOULEVARD MEI-10 CONCORD CA 94520 510-420-0469 FAX

15. SST's First Press Release

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (213) 430-7687
FAX (213) 430-7286

December 20, 1991

FOR IMMEDIATE RELEASE:

SST RECORDS SETTLES LAWSUIT WITH ISLAND RECORDS

OVER NEGATIVLAND'S "U2" SINGLE AND PROPOSES

BENEFIT CONCERT BY U2 TO THE BAND'S MANAGEMENT

SST RECORDS has settled the lawsuit filed against SST by the rock group U2's record company, Island Records and publisher, Warner/Chappell, who compelled the recall of the Negativland single, "U2," released by SST on August 20, 1991. The lawsuit was filed at the Los Angeles branch of the U.S. District Court on September 5, 1991, Case #: CV 91-4735AAH (GHKX).

The settlement imposes a ban on any distribution or promotion of the single and has required that SST pay Island Records and Warner/Chappell $29,392.25 in damages. SST will also be required to make additional payments related to Island Records and Warner/Chappell of approximately $15,000.00.

Legal, manufacturing, advertising and a variety of related costs incurred by SST (thus far) amount to about $45,000.00, bringing the total loss to SST in excess of 90,000.00. This figure does not include the loss of anticipated sales.

It should be noted that the group, Negativland, has paid no legal or other expenses incurred as a result of this lawsuit.

The lawyers representing SST informed the label that to fight the case -- right or wrong -- would cost SST approximately $250,000. Needless to say, it was imperative that SST settle the lawsuit.

The group, U2, have remained silent through all of this activity concerning their music. SST recently contacted the group's manager, Paul Mc Guiness to propose that U2 perform a benefit concert to help offset the legal costs incurred by SST from the settlement.

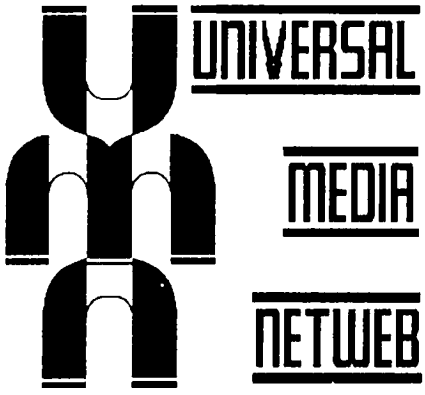
CONTACT:

Ron Coleman, SST Promotions/Marketing Manager at (310) 430-7687

16. Negativland's Second Press Release

FOR IMMEDIATE RELEASE

DATELINE: HOWLAND ISLAND, JANUARY 21, 1992



UMN founder and president C. Elliot Friday announced today that modern noise group Negativland have parted ways with their label SST Records, severed all connections with the mainland music industry, and from now on will hurl their alternative concepts at the milennium independently, under the see-thru umbrella of the UMN and its Found Sound Foundation.

At a gala press conference held on Howland Island amid the whir and blur of high speed construction equipment now working on Mr. Friday's conceptual amusement park, Fridayland, the members of Negativland appeared relieved to be back where they belong. "Corporate rock may suck, but they aren't the only ones," said one member. When asked what caused their departure from SST, the group answered in acapella harmony, "Instead of an ethical and equitable 50-50 split, SST demanded we pay the entire amount of damages incurred in the *U2* lawsuit out of our future royalties." "...and then put out a press release implying we wouldn't be paying *anything*," added Hal Stakke, the group's attorney and backup singer. (See attached SST press release. For a detailed account of group grievances, see Negativland's severance letter to SST, also attached.)

Negativland went on to disclaim any association with all subsequent publicity by SST pertaining to the U2 case, such as the boneheaded "Kill Bono" T-shirt or the silly request for a U2 benefit concert.

At this point, the rotundly benevolent image of C. Elliot Friday appeared on the 40 foot HDTV screen above the podium and announced that those interested in some *U2* aftermath details may refer to the attached settlement agreement submitted to Negativland by SST, and to the fax to Negativland from Chris Blackwell, president of Island Records UK. Mr. Friday then dismissed all reservations about this potential breach of privacy with a resounding, "So what?" Obviously, Mr. Friday, president of the world's largest multi-media conglomerate, and with the entire value of his unparalleled cubist art collection behind him, is taking personal responsibility for these releases and will not bow to any mere executive's attempts at personal image control.

As Mr. Friday's visage twisted into one of those acrobatic pictorial contortions like they do on *Entertainment Tonight,* and finally disappeared, another member of Negativland leaped to the top of a nearby road grader. There, silhouetted against a blood red sun sinking slowly behind the Pacific horizon, he exclaimed, "Our only regret is that those punks now own our back catalog!" (Although SST lacks subtlety, they do not lack Negativland music. In fact, they now own most of it, including a final EP, *Guns*, to be released in February '92.)

(over...)

The issue of music industry contracts and their tradition of music ownership acquisition "in perpetuity," which the creators of that music sign over to their labels for meager monetary advances, will be a primary target for future Negativland print media jams. The group is already at work with the Found Sound Foundation's think tank unit preparing an open call to writers and musicians to submit for circulation and eventual publication statements, articles, and manifestos concerning the following subjects:

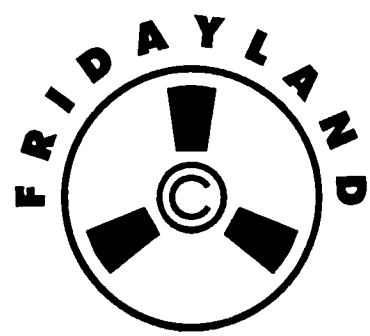
- The authenticity of copyright infringement and sampling as a legitimate creative technique.
- Recording industry contracts: What the say vs. what they ought to say.
- Recording industry horror stories concerning exploitation, corruption, unethical practices, greed, promotional payola, and the wholesale lack of integrity which rules this entire business which likes to think of its products as "art".
- Innovative proposals for how to pursue an alternative career in music independently of all the above crap.

* * * * * *

All further curiosity and inquiries should be addressed directly to Negativland, 1920 Monument Blvd., MF-1, Concord, Ca. 94520; fax 510-420-0469.

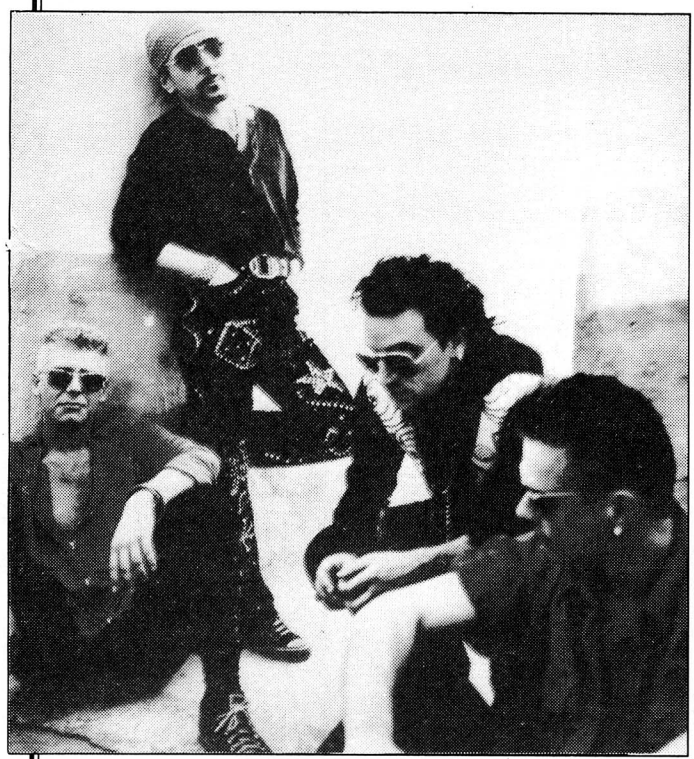
* * * * * *

Attachments:
1. SST's Proposed Agreement for Negativland to Sign (refused)
2. Negativland's Counterproposal Letter to SST
3. Negativland's Severance Letter to SST
4. SST Press Release of December 20, 1991
5. Fax from Chris Blackwell
6. Negativland's Response to Chris Blackwell
7. Negativland Reviews U2's *Achtung Baby*



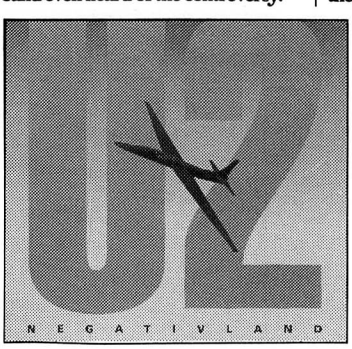
RANDOM NOTES

BY CHRIS MUNDY



Above: U2. Below: The cover of Negativland's parody "U2."

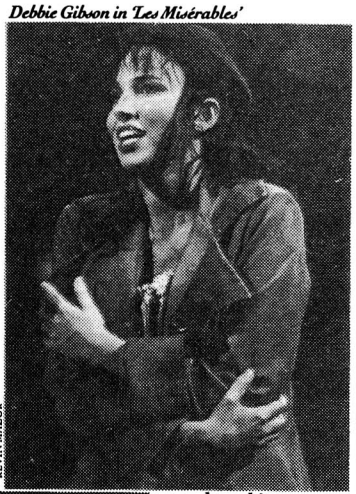
Island Records is a little pissed off that another band is living off the Edge. "U2," a single by the group NEGATIVLAND that features a parody of U2, was squashed like a grape by the supergroup's label before the band even heard of the controversy.



"I understand these guys are sort of media guerrillas and it's basically a plot they initiated that's gone horribly wrong," says U2 manager Paul McGuiness. "I feel very sorry for them." But now that Negativland's label, SST, has shifted all financial responsibility onto the group and has initiated a "Kill Bono" ad campaign, which Negativland doesn't endorse, the band has parted ways with the indie label. "On one level, it's been fascinating," says Negativland's MARK HOSLER. "Putting out that single was just the beginning of an entire art piece. And we're following it through to its conclusion. But we're beyond broke."

It's not just a struggle for creativity. It's a struggle for credibility. Ask DEBBIE GIBSON and SHEENA EASTON. Gibson is yanking in good reviews for Broadway's *Les Misérables*, while Easton is prepping for her New York debut in *Man of La Mancha* by starring in the touring show – which oughta ensure that she'll be remembered for "Sugar Walls" and workout ads. Deb's thanking her lucky costars: "They've helped me a great deal. They realized that positive energy goes further than cynicism."

Debbie Gibson in 'Les Misérables'



KEVIN MAZUR

Sheena Easton in 'Man of La Mancha'

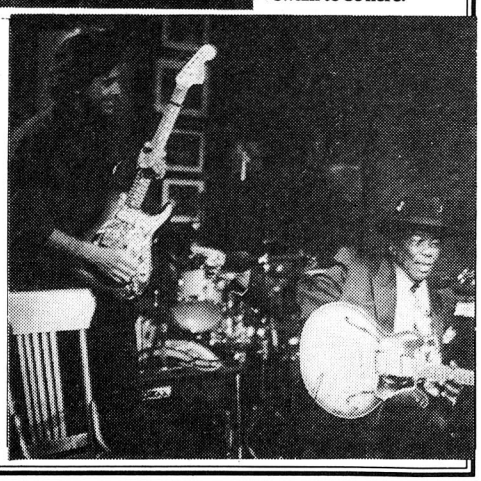
JOAN MARCUS

Shee's next best thing – hanging out in the midst of it with fellow blueshounds like BONNIE RAITT. The rest of us folk have to settle for the next, next best thing: TV. The show was taped for the BBC and will air in the U.S. "With this lineup," said Raitt, "I would have swam to be here."

John's one of the last original blues masters left," said ROBERT CRAY outside San Francisco at Sweetwater, where he helped honor JOHN LEE HOOKER. "All of us adore that music, but we didn't live it." Cray instead opted for the

Ry Cooder (left) joins bluesman John Lee Hooker onstage.

JAY BLAKESBERG



18. SST's Second Press Release

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (310) 430-7687
FAX (310) 430-7286

February 3, 1992

FOR IMMEDIATE RELEASE

FROM: GREG GINN
RE: ISLAND RECORDS LTD. et. al. vs. SST RECORDS et. al.
(CASE# 91-4735AAH(GHKx)

Although we would much rather get back to the work of promoting our music, the misinformation being spread in this case compels me to set the record straight.

Negativland has announced their departure from SST claiming that the label had insisted on recouping "the entire amount of damages incurred in the U2 lawsuit out of our future royalties." This assertion by Negativland is a smoke screen to hide the fact that the group has stuck SST Records with a loss in excess of $90,000 that the group had in fact agreed to take responsibility for and accept. The fact is that SST will consider itself fortunate if we are able to recoup even 10% of this loss from future Negativland royalties. At Negativland's current level of sales, SST would recoup the loss in the year 2257 AD. I'm not holding my breath until that date. Negativland's offer to split the losses 50\50 with SST is actually a smoke screen because the way that the offer is worded would actually result in Negativland paying almost nothing.

Negativland has in the past always agreed in principle to accept responsibility for the material supplied to SST. Now, after SST taking a $90,000 fall as a result of material Negativland chose to release, the group's ethics have conveniently changed. To be blunt the group has lied. Negativland member Mark Hosler can apparently no longer recall my numerous conversations with him in which he reiterated the group's commitment to pay for all costs which may result from their use of material in which a third party claims ownership. I suggest that myself and Mark Hosler commit to a lie detector test to determine who is the lying party. I contend that Mark Hosler is a lying motherfucker. I also suggest that the publications who have printed under-researched misinformation in this case volunteer to pay the cost of this test.

Although SST certainly did not foresee the problems created by the ISLAND-Warner\Chappel suit, Negativland's past recordings have contained material that both the group and SST have been nervous about releasing. These concerns regarding numerous potential problems that the group's use of material may create have been discussed by group members and myself on several occasions. The agreement in our contract with the group is that they take full responsibility for any losses incurred by the label due to claims resulting from Negativland's use of material belonging to third parties.

SST RECORDS
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This sort of contract provision is standard because obviously a label can't always know where a band gets it's material. For example, somebody recently told me that a Negativland piece has a Simple Minds sample on it. I hate Simple Minds. I would never listen to the Simple Minds long enough to even know whether a sample comes from them. Phil Collins is allegedly sampled by Negativland. I don't know--I don't listen to Collins either. Apparently, I've unknowingly released all of this material.

Negativland is a hobby. Members of the group have well-paying day jobs outside of the record industry. They are not poor, nor do they depend on their group for more than extra income. In their history, they have never toured and have only played occasional live shows.

The fact that Negativland is but an occasional hobby for it's members has allowed them the freedom to take well deserved shots at the music industry. This is great. However, the group's lack of experience in the music business and their ability to fall back on cushy day jobs is a liability to those of us in the "real world" who have worked with the group.

I took the ISLAND-Warner\Chappell lawsuit and court injunction seriously. I realized that we were dealing with an angry and powerful company who had just spent more on recording the latest U2 record than we have recording our entire catalog of over 400 records in our 14 year history. (By the way, this is the real tragedy of Corporate Rock. Not that there are never good corporate records--there are occasionally a few--but that such a small percentage of the resources that these corporations use from the planet result in anything excellent.) I had already, along with Chuck Dukowski spent 5 days in L.A. County Jail in 1983 for allegedly violating a court injunction for releasing the BLACK FLAG "Everything Went Black" L.P. L.A. County Jail wasn't a pleasant place (especially for a BLACK FLAG member at that point in time) so suffice to say I wasn't interested in violating an injunction and returning there.

Negativland, however, has treated the whole episode as a joke at SST's expense. The group had promised to hire a lawyer in the instance of any problem. With their upper middle-class corporate day-job incomes they could definitely afford this easier than myself. Instead, they badgered the lawyers that we had to hire with irrelevant, time-wasting and injunction-violating communications which only drove up our legal expenses without helping to defend our cause. Apparently, Negativland are hobby lawyers as well. This resulted in our lawyers threatening a few times to drop our case because they didn't want to be associated with flaky, irresponsible clients who are arguing irrelevant, amateur legal points.

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (310) 430-7687
FAX (310) 430-7286

The end result is that with the games Negativland was playing we felt forced to accept a very unfavorable settlement. Had Negativland stuck with us in fighting ISLAND-Warner\Chappel we could have obtained a better settlement. If the group had stuck to it's agreement with us, we would have been able to do benefits and other fund raisers to mitigate the losses. But Negativland are paranoid, isolated from the "real world," they are victims of the media cocoon that they frequently lampoon. I suggest that NEGATIVLAND take a year or two off from their corporate day jobs and media obsessions to travel out from their cushioned, upper-middle class surroundings to see how the other side lives.

Anybody vaguely familiar with the economics of the record business and Negativland's place in it can rightly assume that SST has never made money releasing Negativland records. SST has at many times stuck it's neck out for the group only now to be subject to Negativland's "take the money and run" attitude. I hope that interested members of the media will take the time to research their facts properly before reporting misinformation that can have a negative impact on the 30 people working at SST, but is just another cheap laugh for cushioned, paranoid upper-middle class malcontents.

OTHER NEWS RE: ISLAND-WARNER¦CHAPPEL vs. SST

SST has yet to receive a response from U2 regarding SST's request that U2 do a benefit to help with SST's losses in this case. Negativland has characterized SST's request as "silly". A loss of $90,000 may seem silly to one with a cushy corporate income, but we here at SST still would welcome the benefit. BONO LIVES !???

Yes $90,000 is a large loss for SST Records. No, it won't affect our release schedule or change any ongoing business. What it will hurt, though, is the amount we will have to spend on opportunities for new groups to record.

A recent Negativland press release referred to SST as "punks" in a derogatory fashion. We are proud of the punk ethics of artistic freedom, D.I.Y., grass roots promotion etc. and are offended that Negativland has attempted to write us off as "just a bunch of punk rockers". From the perspective of their cushy day jobs Negativland has slandered punk rock while circulating reviews the group did of the new U2 record which are relatively positive.

For more information contact Greg Ginn at SST Records (310)430-7687

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FAX (310) 430-7286

BACKGROUND ON SST RECORDS:

SST Records was started in 1978 by BLACK FLAG founders Greg Ginn and Chuck Dukowski. The label is now owned by Greg Ginn. Chuck Dukowski is now the Sales Manager. SST, which also owns the CRUZ and NEW ALLIANCE labels, has experienced steady growth from the ground up surviving the series of independent distributors bankruptcies of the past four years to emerge with a strong and competitive independent distribution network. SST employs approximately 30 people.

SUMMARY OF EVENTS:

August 20, 1991: SST releases U2 by Negativland.

September 5, 1991: ISLAND Records\Warner-Chappel sue SST and Negativland obtaining an injunction against sale and promotion of the Negativland U2. Negativland does not hire lawyer as promised, SST hires lawyer at which time Negativland reiterates to SST the group's commitment to take responsibility for losses resultant.

October 15, 1991: SST pays $29,392.25 as initial payments for settlement while NEGATIVLAND promises new records to SST to pay for losses.

January 21, 1992: Negativland attempts to facilitate squirming out of agreements with SST by issuing misinformation to media in an effort to gain sympathy while leaving SST over $90,000 in the hole.

February 3, 1992: Greg Ginn requests that press who has printed misinformation finance lie detector test for himself and Mark Hosler to help public to determine who the lying motherfucker is.

NEGATIVLAND DISCOGRAPHY

SST 133 ESCAPE FROM NOISE (LP\CA\CD)
SST 252 HELTER STUPID (LP\CA\CD)
SST 291 GUNS (Single)

19. Negativland's Third Press Release

FOR IMMEDIATE RELEASE

DATELINE: HOWLAND ISLAND, FEBRUARY 17, 1992

RE: SST PRESS RELEASE, FEBRUARY 3, 1992

CASE # 91-4735AAH (GHKX)

UNIVERSAL MEDIA NETWEB

NO FOOLIN

* UPDATE * UPDATE * UPDATE *

* UPBRAID * UPBRAID * UPBRAID *

Mark Hosler of Negativland crosses the T in his signature, neatly folds his application to the Howland Island Liar's Club, slips it into a small chromium capsule, and drops the capsule into the vacuum mail tube protruding from the wall behind his inlaid desk, bumping his elbow on one of the desk's outcroppings in the process. The buzzing in his left ear cut short his burst of epithets relating to cubist furniture. The distinctive EQ of C. Elliot Friday's voice suddenly appears in his left headphone as the daily stock listings from Hong Kong drone on in his right.

> *"Mark, the lie detector test is set for next Thursday. Rolling Stone will foot the bill for flying Greg Ginn out to Howland on Wednesday. I've invited all the press that's fit to hint. Casey Kasem has agreed to ask the questions and the whole ceremony will be carried live on Geraldo. Now, don't be nervous! That will only make you look like you're lying. And don't worry about the machine. It's a Fridaytronics lie detector and your electrodes will actually be recording the heartbeat of a sea turtle in the next room. Nothing disturbs them– that's what their shell is for. Oh, and wear that blue pinstripe suit with the power tie I gave you. Remember, you're a believable executive now and we want to contrast the downtrodden, mom & pop punk image that the SST entourage will present. The rest of Negativland will be there for, dare I say it, moral support, but I want you to keep a plug in the Weatherman. Casey doesn't want to be subjected to any sensitive language. I've sent a schedule of Thursday's events over to your office. Please check it over. Friday out."*

Mark punches out the Friday line but lets the Hong Kong stocks roll on in his right ear as he leans back in his award winning chair and adjusts the peacock down cushion that comes with this day job. He relaxes now, gazing out through the curved glass that wraps around his 17th floor office in the Found Sound Foundation's Howland Tower. He watches the remnants of dense white fog from Friday's smoke screen machines drift away from the island and out across the Pacific. There must have been a passing ship or plane detected. He could see Friday's vintage U-2 parked outside its hanger on the runway below. They must be getting it ready for the trip to L.A. to pick up Mr. Ginn– a nice touch, he thought.

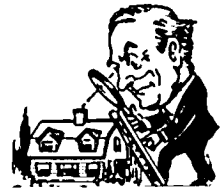
Now his eyes withdrew, refocused, and wandered across the shiny gold records mounted on his cherry burl paneled wall which he and Negativland had made as a hobby. He wonders if they would ever have the time to take up carpentry again. Or to make records. He leans forward to the sculptured grid of his desk top and fingers the crystal cube paperweight encasing a perfectly preserved media cocoon which he had purchased at a punk rock club back in the "real world." "Ah, those were the days..." He tried to remember at exactly what point the importance of truth became mediated by the importance of money.

(over...)

With a sigh of resignation, his lowering gaze comes to rest on the schedule of next Thursday's events.

UNIVERSAL MEDIA NETWORK

Thursday, February 20, 1992



10:00 AM Tour of Howland Island and Fridayland construction site

12:00 NOON The great lie detector test-off & photo-op. (catered)

1:00 PM Negativland victory press conference & press kit handout.

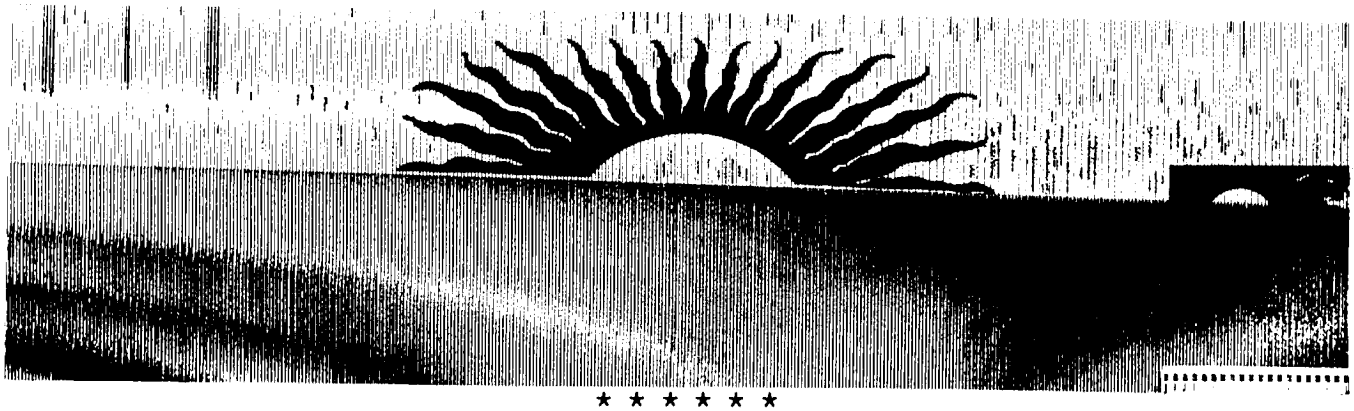
Press kit includes:

* A detailed accounting of how much profit SST makes on each record it sells ($4 to $5), contrasted with how much less the artist makes on each record sold ($1).
* A "2257 or Bust" button.
* A discography of Negativland albums and cassette-only releases which SST will now sell until 2257 AD without paying the artists one penny.
* A copy of an SST contract and a copy of an Island Records contract with the interchangeable clauses pertaining to label ownership of the artist's work "in perpetuity" printed in BOLD.
* A signed affidavit from C. Elliot Friday attesting to the fact that if he had not stepped in with consulting positions at the UMN for the four principal members of Negativland, they would now be unemployed, without any funds to pursue their hobby of music, and be close to broke in their personal lives.
* A "Greg Ginn doesn't know what he's talking about" bumper sticker.
* A short pamphlet of amateur legal hobbyist principles such as, "Pay royalties that are due on time", "Back up your stated principles by sharing with your 'partners' the burden of consequences from a mutually agreed upon act", "See to it that the artist, not the manufacturer, retains ownership of his/her work", etc.

2:00 PM Adjourn to the Howland Island Disco Pit where every record by Simple Minds and Phil Collins will be played while members of the SST entourage and the press are invited to guess which ones were sampled by Negativland. There will be no winners, but everyone will receive another "Greg Ginn doesn't know what he's talking about" bumper sticker.

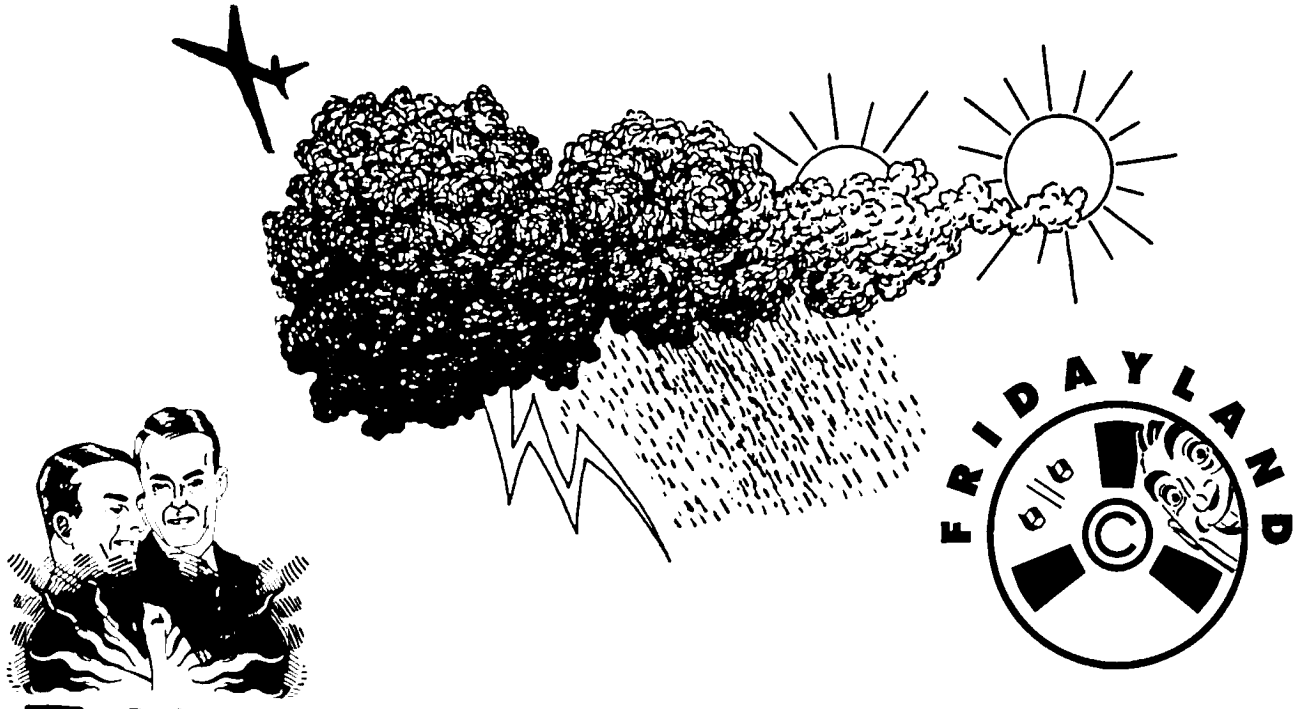
5:00 PM The SST entourage and members of the press take off for their return trip to the mainland, with a brief holding pattern overhead to view the daily submerging of the artificial island beneath the blue Pacific.

Mark Hosler crosses the T in his scribbled initials at the bottom of the events schedule. The Hong Kong stock listing he'd been waiting for finally appears in his right ear. Plastic Plumbaphones are still down. He'd have to hang on a little longer. The dive alarm signals the end of another business day. He leans back on his Cushy Brand cushion, loosens his Power Brand tie, and lazily gazes out the curved, Panorama Brand window at the usual blood red sunset. He casually notices that he is no longer slightly apprehensive when the water level of the Pacific ocean slowly rises outside to swirl away his 17th floor view in bubbly confusion. Soon he would be asleep in the deep.



★ ★ ★ ★ ★ ★

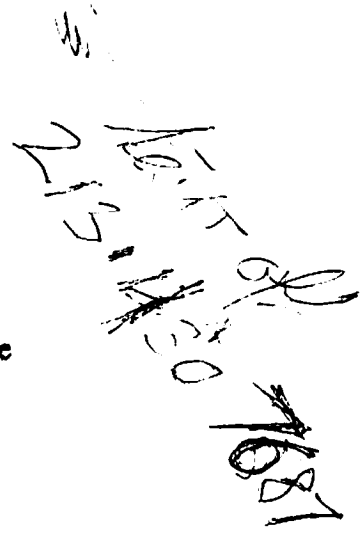
All further curiosity and inquiries should be addressed directly to Negativland, 1920 Monument Blvd., MF-1, Concord, Ca. 94520



Methods of Torture

You Don't Even Live Here

20. This Is Not Real– Just Kidding



ISLAND

ISLAND RECORDS INC
14 East 4th Street
New York NY 10012
Tel: 212-477-8000
Fax: 212-475-8254

Chris Blackwell
Island Records, London Office

Re: Negativland/U2

Dear Chris,

Just received a final packet of clippings from Paul McGuinness via Dermott Hayes. I'd say the U2-Negativland flap is just about over as far as we're concerned. As you will see, Negativland has split from SST over the settlement payment and now they are both releasing feuding press statements about each other, leaving us pretty much in the clear. I think this allows us to quietly leave their little mud fight by the back gate without anyone noticing. I suggest you have your receptionists answer all future inquiries with, "This case is closed."

I understand the "Kill Bono" T-shirts are flopping because they tend to bleed, and I don't understand SST's silly request for U2 to play a benefit for them. Is that guy Ginn for real? I think we could allow U2 to do some selected interviews soon, perhaps in a month or so. Sorry to restrict them from the press during this release period but no embarrassing questions means no embarrassing answers. I hope it hasn't been too frustrating for them to keep silent during this whole episode, but it has paid off in the long run. Tell the boys to watch it, though, and if they get any Negativland questions, ignorance is still the best policy.

Yours,

Eric

P.S. If you're still playing the stock market, I've got a hot scoop for you. Plastic Plumbaphones of Hong Kong. Sure fire. Check it out.

21. Fax from Paul McGuinness, U2's Manager

28-JAN-1992 02:08 PRINCIPAL MGMT LTD - LDN 01 792 1729 P.01

Principle Management Ltd
30-32 Sir John Rogerson's Quay, Dublin 2, Ireland
Telephone: (Dublin) 777330 Facsimile: (Dublin) 777276.
Please reply to above ☒

Principle Management
Limited & Incorporated

Principle Management Inc.
250 West 57th Street, Suite 1302, New York, NY10019
Telephone: (212) 765 2330/2/9. Facsimile: (212) 765 2372.
☐ Please reply to above

FAX

To: Negativland From: P.McG.

Subject: your fax to Dermott Hayes 26/1/92

Date: 28/1/92 Number of pages including this one: 1

A "substative response" maybe a problem for me:

(1) Have you repudiated S.S.T.?

(2) Do you think U2 are to blame for your predicament?

Sorry to hear of your (unspecified) bereavement.

Condolences....

Paul

cc. Everyone concerned.

"...a problem for me..."

22. Negativland's Fax to Paul McGuinness

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

February 12, 1992

Dear Mr. McGuinness/U2–

Your recent fax and your reasons for sending it remain a mystery to us, but we'll try to guess what you meant and tell you the following things.

Negativland has now completely stopped working with or doing business with SST Records and we think that their behavior in this matter, like Island Records', has been both unethical and idiotic. Since you seem to be reading all the faxes that we send to Dermott Hayes, we suggest that you re-read those for the details. The "Kill Bono" T-shirts that SST are selling should probably read "Kill Eric Levine" instead, but SST seems to be too stupid to make a distinction between Island Records' actions and the group U2, a distinction clearly made by us in all our dealings with the press. You should look at the original five page statement we sent you/U2, entitled *U2 Negativland: The Case From Our Side,* and you will see that our complaints are directed solely towards Island Records. U2 is not directly responsible for what has happened to us. But like anybody else they and you are responsible for the type of people you choose to do business with and the type of action they take to "protect" their/your interests. As we're sure you know, Island Records is owned by Polygram, and Polygram is owned by Philips. What you may not have discovered is that Philips, besides manufacturing audio equipment, is ranked 66th out of the world's top 100 defense contractors, is in the top 50 contractors of the U.S. Department of Defense, and has a significant presence in South Africa (about 4000 employees). Apparently you are too busy with the good public relations of Greenpeace and Amnesty International endorsements to actually take a hard look at this or all the corruption and immorality within your own business. (We suggest you read the book *Hit Men* by Fredric Dannen for more details on that.)

A few other things– We frankly find it impossible to believe that a group who can sell 14 million copies of a record could have been powerless to stop this lawsuit from occurring. Island must have checked with you before going ahead with this because they would not want to risk angering their biggest moneymaker. Why not just be honest, Mr. McGuinness, and simply admit that no one in U2 or their management is concerned enough about this action or the issues it raises to do anything about it. You're too busy, it's too much trouble, and it's now become obvious that your only real concern is with the damage this might do to U2's image.

Regarding the lack of a 'substantive response' from you, we meant exactly that: we've sent you copies of the record we made about you (no response); we've appealed to the band to get involved with Island (no response); we've asked for permission to include a U2-related track on our live album (no response).

As for Negativland, please forget the squabbles between us and SST and imagine this, should you ever reflect back on this episode: What if U2 owed Island Records more money than they have earned in the last ten years of their existence and had to pay it back out of the royalties of their back catalog? That is the position we find ourselves in because of the actions of Island Records.

–Negativland

(Chris Grigg, Mark Hosler, Don Joyce, Richard Lyons, and David Wills, in various combinations)

P.S. Chris Blackwell now seems to have lied to us when he promised us a response to our faxed proposal of December 12. If you'd care to prod him into actually responding, it would be greatly appreciated.

1920 Monument Boulevard #E-U Concord CA 94520 510-420-0469 FAX


STOP

23. *San Francisco Guardian* Interview with Greg Ginn, Owner of SST Records

echo
CHAMBER

By Kurt Wolff

OK, IT WAS fun when it started, but now it's getting dirty. I'm talking about **Negativland/SST vs. U2/Island**: I hate to keep the story rolling, but a Feb. 3 press release from SST owner (and former Black Flag guitarist) Greg Ginn was just too heavy to let lie.

If you remember, Negativland's *U2*, released just before Island Records released U2's *Achtung Baby*, had to be recalled and remaining copies **physically destroyed** after Island and music publisher Warner-Chappell shot a fat lawsuit at Negativland and its label SST (the letter U and the numeral 2 were emblazoned across the cover; the song mixed bits of U2's *Joshua Tree* hit "Still Haven't Found What I'm Looking For" with off-mike comments from **Casey Kasem** about the Irish Wunderkinder: "These guys are from England **and who *gives* a shit?**" fires Kasem as a twisted and pulled-apart version of U2's hit grunts and farts behind him. "I can't believe *he* hasn't sued" a friend of mine wonders).

There's no question that *U2* is clever, musically adept, and funny as hell. No, the current controversy is not about the music. With lawsuit damages hovering around $90,000, the tension between friends has begun to crack.

In a Jan. 21 press release, Negativland said it's **leaving SST**, feeling the label is laying the entire cost of the lawsuit in its lap (*Rolling Stone* reported on Negativland's statement in its Feb. 20 issue). In his Feb. 3 press release, Ginn asserts that Negativland's contract with SST stated clearly that the group will "take responsibility for any losses incurred by the label due to claims resulting from Negativland's use of material belonging to third parties" ("Virtually every record contract has a similar clause," Ginn later explained), and that the group is now trying to back out of its responsibility. Because of this, writes Ginn, "I contend that [Negativland's] Mark Hosler is a **lying motherfucker**." Unfortunately, Hosler hadn't returned my phone calls by press time.

Who's ultimately responsible for **paying the debt** is still unclear–Ginn suggests he and Hosler undergo a lie-detector test. But it's when bickering like this enters the fray that even the issue at hand begins to lose relevance. Ginn's press release bleeds into insult territory: "Negativland is but an occasional hobby"; "the group's lack of experience in the music world and their ability to fall back on **cushy day jobs** is a liability to those of us in the 'real world' who have worked with the group." Harsh stuff, though with $90,000 at stake you can understand that he'd be pissed, especially when he feels the group hasn't taken the issue seriously enough.

On the phone, however, Ginn spoke freely and calmly about the conflict. "I don't have any interest in 'getting back' at Negativland," he says– a gentlemanly attitude considering the fury of his written words. He expressed no desire to take the group to court; rather, he says he simply wants to get the matter cleared up so he can get back to business.

For now, his hope is in a **letter he sent to U2** asking them to perform a benefit to recoup SST's and Negativland's losses. "U2 did acknowledge our request. And a Detroit radio station [one that plays U2, says Ginn] is willing to cosponsor it. That's **a serious thing.**"

He also says he had plans to do a benefit record and offers from people willing to help out on other fundraising ideas. "But with Negativland bickering with us, these aren't going to come to fruition. It's **wasteful** that they chose to skip out instead of working with us."

Creating controversy in the media "is one of their hobbies," says Ginn, "And sometimes it's entertaining." But he feels his small record company has been caught in the middle and stands to lose the most. The group "has treated the whole episode as a **joke** at SST's expense" he writes in his press release.

Is this controversy just the next notch in another covert Negativland art piece? Or have the group's guerrilla tactics finally gone irresponsibly awry? They've **struck a nerve** once again, though this time it's with some of the very same people the band used to amuse. There's no doubt, however, that whatever motivation may lie beneath the surface of this conflict, the band still has our attention. Does this mean they're still several steps ahead? ■

24. SST Hires Corporate Rock Lawyer to Sue Negativland

MARTIN COHEN
FRANK C. LUCKENBACHER*
EVAN S. COHEN
S. MARTIN KELETI**

*ALSO CERTIFIED PUBLIC ACCOUNTANT
**ALSO MEMBER DISTRICT OF COLUMBIA BAR

COHEN AND LUCKENBACHER
LAWYERS
740 NORTH LA BREA AVENUE
SECOND FLOOR
LOS ANGELES, CALIFORNIA 90038-3339
(213) 938-5009
FAX (213) 938-6384

February 26, 1992

Mr. Don Joyce
Mr. Richard Lyons
Mr. Chris Grigg

Re: **Indemnity Agreement Between the Members of Negativland and SST Records, dated September 10, 1990, and Master Recordings Owned by SST Records**

Gentlemen:

This firm has been retained to represent Greg Ginn, doing business as SST Records, with regard to your agreement to indemnify SST Records in connection with the recording entitled "U2 Negativland," and, as well, with regard to certain master recordings in your possession which are the property of SST Records.

With regard to the "U2 Negativland" situation, our client has referred to us the Record Contract dated September 10, 1990, in which the members of Negativland agreed, in paragraph 10, to:

> "indemnify, save, and hold SST Records harmless from any and all loss or damage (including attorney's fee) arising out of or connected with any claim by a third party which is inconsistent with any of the warranties or agreements made by the Artist in this contract."

As you are well aware, on or about September 3, 1991, the record and music publishing companies associated with the recording group "U2" brought suit in Federal Court against SST Records, and against each of you, on account of certain acts of copyright infringement which were committed by Negativland with regard to the "U2 Negativland" recording. As a result of this suit and the subsequent settlement of that action, SST Records sustained a loss in the amount of at least $90,624.33. This figure includes monies paid to Island Records as a settlement amount and as proceeds from the

phonorecords of "U2 Negativland," as well as legal fees, lost production, manufacturing, and advertising costs, shipping costs, mastering costs, and lost employee time. In addition to the fact that the contract specifies that you are liable for these expenses, we have been informed that at various times and places, representations were made to Mr. Ginn that you understood and acknowledged your obligation to SST Records to pay these amounts.

We have been instructed by SST Records to file an action against each of the members of Negativland if a suitable arrangement to repay SST Records cannot be reached. At this point, it may be helpful if you or your legal representative contact me so that we may discuss the resolution of this matter short of a suit being filed. This is especially true because the further expenditure of legal fees by SST Records to collect this debt will only add to the amount of damages which SST Records will seek from each of you.

As for the other matter, our client informs us that in early October, 1991, you agreed to convey to SST Records two (2) albums of Negativland recordings, namely, a "cassette only" recording and a "double live LP." This agreement was confirmed by the fact that you accepted the advances for these recordings, by means of endorsing and negotiating Check No. 8032, dated October 4, 1991 and made payable to Chris Grigg, in the amount of $4,500.00. This check represented an advance of $1,000 for the "cassette only" album, and $3,500 for the "double live LP" album.

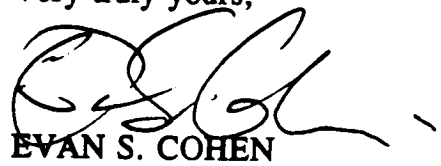
Based upon this confirmation of the agreement between you and SST Records, our client is the copyright proprietor of those recordings, as well as the owner of the master tapes on which those recordings are embodied.

Therefore, on behalf of SST Records, we hereby demand that the master tapes comprising those two albums be delivered to our client without delay. Again, this is also may be a matter which may be resolved short of litigation being instituted. If it cannot, this matter of the master tapes will also be the subject of the suit which our client has authorized us to file.

I look forward to hearing from you with regard to each of these matters within the next ten (10) days.

Nothing herein should be considered an election or waiver of any of our client's rights or remedies, all of which are expressly reserved.

Very truly yours,



EVAN S. COHEN

ESC/dg
cc: Greg Ginn, SST Records

25. Credit Report on SST Records

FINANCIAL INFORMATION REPORT
PAGE 1 OF 1
21031 000028

CREDIT ADVISORY SYSTEM

Prepared for: 93-069951
GARY POWERS

THIS FINANCIAL INFORMATION REPORT IS INCLUDED AS PART OF YOUR INQUIRY.

-----DUNS: 3-052-127 -----------	DATE PRINTED	SUMMARY	
SST RECORDS	APR 21 1992		
		STARTED	1978
BOX 1	WHOL RECORD ALBUMS	SALES	$5,000,000
LAWNDALE CA 90260	AND RELATED ITEMS		(Proj)
10500 HUMBOLT ST		WORTH F	$1,205,001
AND BRANCH(ES) OR DIVISION(S)	SIC NOS.	EMPLOYS	34
LOS ALAMITOS CA 90720	50 99 57 35		(34 HERE)
TEL: 310 430 7687		HISTORY	CLEAR

----------FINANCIAL INFORMATION----------

09/04/91 Interim statement dated SEP 30 1990:

Cash	$ 137,282	Accts Pay	$ 164,170
Accts Rec	664,436	Royalties Payable	761,207
Inventory	1,314,959	Lease Payable	7,320
Curr Assets	2,116,677	Curr Liabs	932,697
Fixt & Equip	37,904	Lease Payable	25,661
Deferred Interest	8,778	NET WORTH	1,205,001
Total Assets	2,163,359	Total	2,163,359

From JAN 01 1990 to SEP 30 1990 sales $2,449,277; cost of goods sold $940,055. Gross profit $1,509,222; operating expenses $404,935. Operating income $1,104,287; other income $67,669; other expenses $350,000; net income before taxes $821,956. Net income $821,956. Monthly rent $4,000.

Submitted by Katherine Parazin, controller. Prepared from books without audit.

--0--

Other income is for licenses, royalties and interest expenses.
Other expenses is for reserve for taxes.
On AUG 29 1991 Katherine Parazin, controller, referred to the above figures.
She also submitted the following partial estimates dated AUG 29 1991:
Projected annual sales are $ 5,000,000.

HISTORY
09/04/91
GREG GINN, OWNER

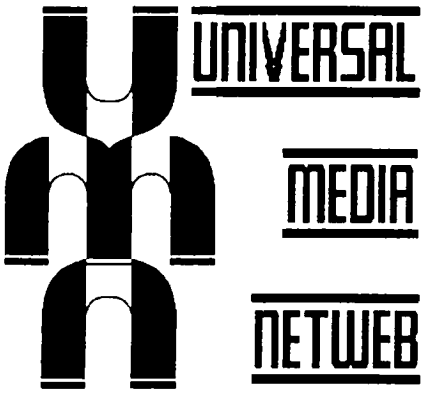
Ownership acknowledged verbally by Katherine Parazin, controller on AUG 29 1991.
Business started Feb 1978 by others. Relocated fall 1990 from Long Beach, CA.
GREG GINN born 1954. 1978-present active here. 1975-present active as a professional musician, CA.

----------BANKING COMMENTARY----------

03/92 Account(s) averages medium 5 figures. Account open over 10 years

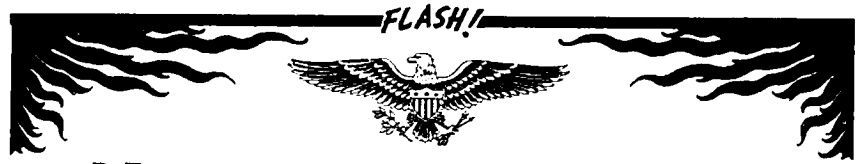
26. Negativland's Fourth Press Release

FOR IMMEDIATE RELEASE

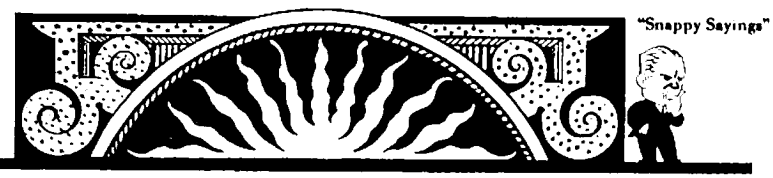


DATELINE: HOWLAND ISLAND, MARCH 4, 1992

RE: COHEN AND LUCKENBACHER AND SST



NEGATIVLAND vs. L.A. LAW



Howland Island, slightly shuddering, breaks through the surface of the Pacific and rises majestically to its waterline as foamy waterfalls continue to pour off the towers, rocks, and buildings, all edged in gold from the rays of the rising sun. Mark Hosler's alarm goes off. His sleepy hand fumbles for the off button. Now his mind begins, and he wonders why he hasn't felt the distinct bump which occurs every morning when the island reaches the apex of its ascent. –Then the instant recognition of his new surroundings.

"He's no longer on the island and we are not at liberty to divulge the present whereabouts of Mr. Hosler." Mr. Friday's executive attendant's voice reminded Mark of his office. She hadn't recognized him– his voice implant was way cool, even in the morning. He mumbles something about some imaginary deadline at *Spin* and then puts another question to her. Then another. "We don't know why Mr. Hosler wasn't named in the threat to sue, especially after Mr. Ginn singled him out to test"..."No, we still don't know why Mr. Hosler's heart stopped during the test-off, but we can assure you he's in fine health now." Mark nods to himself, satisfied that the island has its story together. As he hangs up the radio-telephone he hears his two bodyguards begin a vigorous snowball fight outside.

The rest of the group, heads bowed, shuffle around on one of the simulated pink coral outcroppings at the edge of Howland Island as the Weatherman reverently nudges the aged sea turtle's corpse into the deep, dark sea. After briefly marveling at something so dumb getting to live 184 years, and a few frowns in the direction of Friday's sheepish wildlife wrangler, they make their way up onto the rollerpath and route themselves to Soundstage #17.

"Alright everyone, we'll start with the Weatherman on the stand," says the director, an old friend of Friday's from the Hollywood days. A Fridaytronics accountant, playing the prosecuting attorney, hikes up his Bermuda shorts and approaches the stand studying his script. "Now, Mr. Weatherman," he begins, "would you please tell the court how many hours a week you spend watching The Playboy Channel?" "Objection!" The island's pastry chef, who was playing defense, leaps to his feet. "My client doesn't *watch* it, he *fixes* it! These legal tarpit tactics of character assassination by my esteemed opponent from Los Angeles only show his complete disregard for my client's undisputed preeminence in the musical farts..." Defense pauses, silently rereads the last line, and flicks a dried blob of chocolate mousse off the last word in it. "*Arts!*" , he continues... Howland's master shrub sculptor, playing the judge, bangs his gavel, one of the few wooden objects on the treeless island, loudly. "Overruled," he reads, "This trial has no bearing on the arts; this is about *business*!" It wasn't in his script, so the Weatherman thinks to himself, *He's sure got that wrong.*

C. Elliot Friday flips off his Soundstage #17 monitoring channel and slowly revolves to gaze out across the crawling construction site of Fridayland. He'd have to play this just right. These corporate entertainment attorneys SST had hired are very expensive adversaries...Well, at least Hosler was safely hidden for now. He takes a shallow breath, the only kind he can take on this planet, and refocuses on the potential. Negativland would need a few more weeks of trial rehearsals, but this should make a great piece...

* * * * * *

All further curiosity and inquiries should be addressed directly to Negativland, 1920 Monument Blvd., MF-1, Concord, Ca. 94520.

27. Negativland's 'Letter to the Editor' of *BAM Magazine*

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

April 14, 1992

BAM, fax 510-934-3958
attn: Letters column

Dear BAM,

We would like to make a few comments about Greg Ginn's letter, "SST vs. Negativland, Part...?" (BAM, April 1). His "letter" was an abridged and cleaned up version (obscenities deleted) of an SST press release he sent out to the press several weeks ago. We have already responded to that press release with our own, but since his thoughts have now appeared as a "letter" for public consumption, we also have a few thoughts on vanity and greed for the public to consider.

Refuting his letter point by point is entirely possible but probably futile in an exchange so spread out in time that we can hardly expect readers to remember or care who last said what. In short, we can assure you that anyone trying to locate "misinformation" in this grand opera of deceit will find as much of it in Greg's head as they will in ours. Most disturbingly, Greg continues to state "facts" about our personal lives and finances which could not be more exactly opposite to the truth. In that case, he is apparently invoking 6 year old bio material on us, adding some insulting assumptions, and stupidly assuming that nothing ever changes. In fact, everything has changed.

But now, as SST has officially stated its intent to sue Negativland for the entire amount of damages incurred in the settlement of the U2 case with Island Records, and Negativland is thrust into creative and economic limbo because SST is now paying us no royalties and claiming two additional new records from us as part of their threatened lawsuit, SST will go on doing business as usual. Ironically and hypocritically, they have used their economic power to smother us, just as Island used their economic power to smother SST. Financial protection is the whole name of the whole game in the music biz from top to bottom. It is the artist who is at the base of this economic food chain, but it is the lowly artist who is apparently supposed to eat it all in the end.

Negativland intends to fight back. We now have pro bono legal help in disputing SST's presumptuous contractual claims, and we intend to go on publicizing all of SST's moves in this matter in every way we can, just as we have done with Island.

Despite Greg Ginn's lack of appreciation for our never-out-of-play sense of humor, we *do* consider all this as grist for our creative mill. What other conceivable use is it good for? Greg has been struggling with the anachronisms of his "record executive" odyssey for many years now, and though he probably hasn't let himself notice, he now actually acts like one. We consider his actions to be completely hypocritical to his own stated principles and here is why: MONEY. Here is how: In Greg's own, often dyslexic, view of SST, he has a mission which is admirable enough. He intends to be in opposition to corporate rock and, yes, it does still suck. (Though you would hardly suspect it from this magazine.) SST does not create or groom artists for market appeal. They do not mold their products for commercial airplay. SST promotes the emergence of grassroots inspiration and artistic freedom for alternative music that arises out of cultural imperatives rather than market demands. Thinking these to be hard-held beliefs, one might assume, as we did, that when such music comes under legal attack from an embarrassed corporate mainstream, SST would naturally stand and share the consequences with the artists who actually manifest these SST principles. This was not the case. Greg would never even discuss our standing offer to split the damages 50/50. The fact that it was a mutual agreement to release this record didn't seem to matter. Instead, Greg has casually ditched the authority and primacy of his artistic principles in favor of self-serving economic protection (as any kick-ass executive would).

It was perfectly clear in Island's legal briefs that economic protection was their motivation in suing SST and Negativland. At least they were honest about why they suck. SST is using exactly the same strategy for exactly the same reason against us, and worse, their demand for our next two records, (for which we will receive no royalties if they have their way) would leave us without any income at all for the foreseeable future. SST seems intent on stopping our very ability to keep working. Our conclusion? Independent labels suck too.

–Negativland

1920 Monument Boulevard Mail-O Concord CA 94520 510-1420-10469 FAX

"Gimme Gimme Gimme, I need some more! Gimme Gimme Gimme, Don't ask what for!"

28. Negativland Responds to SST's Corporate Rock Lawyer

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

March 5, 1992

Evan S. Cohen
Cohen and Luckenbacher, Lawyers
740 North La Brea Avenue
Los Angeles, Ca. 90038-3339

via Registered Mail, Return Receipt Requested

cc: Greg Ginn, SST Records

Re: Your letter of February 26, 1991

Dear Mr. Cohen,

We have received your letter of February 26, and are eager to reach a resolution with SST Records in regard to the issues you have identified. We have already made serious proposals to SST regarding settling the *U2* damages and repaying the advances for the other two releases. We have received no response from them for approximately three months. We hope we will now be able to discuss this matter with you.

We would like to reiterate at the outset that our previous offer to SST is still open. We are willing to agree to allow SST to recoup 100% of royalties due us on all of our SST releases until 50% of SST's legitimate costs in the *U2* matter are met. We make this offer in good faith in hopes to set right a situation for which we are partly responsible from an ethical basis, despite the fact that we see no legal basis for a financial liability, and despite the economic effect on us as artists of this loss of income from our body of work. Contrary to Mr. Ginn's representations, we dispute that we have agreed to pay 100% in this.

The *U2* Damages

Much of this matter derives from a contract clause that is at best ambiguous. Until SST's demand in October of 1991 that we pay for 100% of the *U2* damages, we had not questioned Mr. Ginn's explanation of the indemnity clause in his *U2* contract. At that point we decided to examine the matter more carefully and consulted a number of entertainment lawyers, who have interpreted the indemnity clause to which you refer as not relevant to the suit brought by Island/Warner-Chappell. The damages SST has incurred did not in fact arise from a third party claim "inconsistent with any of the warranties or agreements made by the Artist" in that contract, as the contract includes no warranty or agreement that the material delivered is wholly of the Artist's authorship, nor that the packaging design supplied by the artist does not violate federal trademark law (which was the thrust of their case). The only warranty is "The Artist warrants and represents that he is under no disability, restriction, or prohibition, whether contracual or otherwise, to execute and perform this contract." i.e. the Artist is not a minor, is of sound mind and body, has not promised the material to any party other than SST, and is capable of delivering the material to SST, where it is to be inferred that the "agreement" referred to in item 1 of the contract is to take place ("The project is to consist of material agreed upon by the Artist and SST"). This mutual agreement provision further strengthens our point that Negativland should at worst case contribute 50% of SST's legitimate costs. The only requirement of the artist, which is implicit in the contract but not explicitly stated, is to deliver the material. It is customary in the record in-

1920 MONUMENT BOULEVARD #E-U CONCORD CA 94520 510-1420-10469 FAX

dustry for contracts to include provisions explicitly warranting that the material being delivered is wholly of the artist's authorship, but this contract omits such language. Ambiguity is customarily construed against the drafter of the agreement.

It is important to note that the Island/Warner-Chappell suit centered not so much on issues of copyright infringement as on a violation of the Lanham Trademark Act. Although the matter will never go to trial, the copyright issues mentioned in the suit would in all probability have been dismissed on first amendment and fair use grounds, given the work's unmistakable basis as social commentary (enclosed is a cassette of the material). Although the cover art elements, including the large "U2", were provided to SST by Negativland, Negativland has no liability to SST for the cover of the record, as 1) trademark law is a concern for SST as an experienced marketer more than for Negativland as recording artists; 2) the indemnification clause does not refer to the packaging of the recording, only the recording itself; and again 3) item 1 of the contract states "The project is to consist of material agreed upon by the Artist and SST," so SST had both the right and an opportunity to veto the cover.

SST was under no duress to release our *U2* record. SST was fully aware that 1) there was a group called U2 releasing records, and that there was therefore a potential for problems under trademark law; 2) our record sampled U2's recording, and that there was therefore a potential for problems under copyright law (Mr. Ginn's personal assistant has told us that she had anonymously checked with Warner-Chappell regarding sampling clearances on U2 material and was informed that they are never granted); 3) our record was a cover version of a U2 song that was published by another music publishing company (whom we acknowledged in the label art we supplied for the release; at Mr. Ginn's direction we put our own publishing company name, Seeland MediaMedia, on the labels as well). SST heard the tape before it was released, and was fully aware of the large "U2" on the cover since they did the final artwork preparation. As Mr. Ginn told Mr. Grigg and Mr. Joyce in a phone conversation shortly after the Island/Warner-Chappell suit was filed, "I knew what I was getting into." In that same conversation Mr. Ginn indicated to us that he had been advised by an attorney not to release the record; however he did not inform us of this until after the Island/Warner-Chappell suit struck. As the party both most immediately at risk and with the most at risk, and with full knowledge that the record was dangerous, it was Mr. Ginn's right and opportunity to unambiguously protect himself in his contract against this kind of product liability if he truly sought a blanket indemnity. And of course SST could have simply declined to release the record.

Nonetheless, and quite outside of the realm of law, Negativland salutes Mr. Ginn's courage for putting the record out. The Island/Warner-Chappell suit was unnecessarily and unpredictably harsh, and we sincerely respect Mr. Ginn's financial losses in this matter. Despite not being legally liable for SST's costs, and despite not having any money, we acknowledge, from a moral basis quite outside of the realm of law, that as partners in the project and the creators of the work in question we ought to contribute to righting its consequences. It is in this spirit that we make our 50-50 offer. We should note that we have seven other releases on SST (*Escape From Noise*, *Helter Stupid*, the *Over The Edge* series volumes 1-4, and *Guns*), and have offered to apply all of our royalty revenues from all of these releases toward the *U2* damages. All of these releases (except perhaps *Guns*, which is new) are now producing a profit in terms of our royalties, and the Negativland name has now been publicized more than ever before as a side-effect of our recent troubles; this should make it much easier for SST to sell these records. In offering this income stream to this cause we are offering to cut ourselves off from a source of basic living expenses and are putting ourselves in the position of starting our artistic career over from scratch, financially speaking. This is a serious commitment for us, and a serious loss. We are not attempting to 'get out' of anything, we are offering to pay dearly.

As to the exact dollar amount SST is claiming, SST has not provided an itemized accounting of the costs it claims in this matter for our examination. We would need to see this before agreeing to anything specific, but again are more than willing to discuss a settlement agreement.

The Live and Cassette-Only Releases

First off, your letter appears to presume the existence of completed master recordings for these releases. In fact there are no finished master recordings at this point, as a great deal of editing remains to be done on each recording before they'll be ready for release. In the case of the Live record, the editing needs to be done digitally, which we cannot currently afford, and several creative decisions remain to be finalized. The Cassette-Only release is being edited on analog 2-track tape, which is not a barrier to completion, but is also not yet finished from a creative standpoint. We have depleted our funds and creative energies over the past several months in communicating our situation to the press and consulting legal counsel, and do not have an estimate of when the tapes could be ready to go. Cover artwork is also incomplete in both cases.

What is more important is to explain why we are where we are in regard to these two records, and this is intertwined with the *U2* situation. Please bear with us for a moment.

Negativland has attempted to deal with SST in good faith throughout this difficult period. When the *U2* suit arrived, we agreed to work with SST and the attorney they hired to deal with the suit, on SST's strong recommendation. Responding to Mr. Ginn's request, we delivered them a replacement record, *Guns*, in three weeks' time, including graphic materials, at great hardship and for a minimal advance (we ordinarily take over a year on each record). We abided by SST's lawyer's instructions, including not going to the press with our story for a very long time. We bowed to their pressure to finalize the contracts for the Live and Cassette-Only releases, which we had been discussing for some time previously. At this point SST's lawyer, Michael Blaha, indicated to us that he was certain that SST would deal with us fairly when it came time to assign financial responsibility for the episode. SST then sent us the $4500 advance check for the two recordings, which we deposited. At this point SST dramatically changed their approach to us, sending a paper for us to sign authorizing them to deduct anything they liked from our future royalties because of their *U2* losses (see attachment). This agreement had no provisions for verifying or itemizing the amounts to be recouped, had no time or dollar limit, and did not prevent SST from additionally litigating against us. We were shocked at this, as we felt that Mr. Ginn obviously at least shared responsibility for the damages from a common-sense basis, and that we were not contractually liable for the losses, as discussed above. Further, we suspected that Mr. Ginn knew that his contract did not protect him (because if it had actually protected him, no further agreement with us would have been necessary for him to attach our royalty stream to recoup his losses), and that this agreement was therefore an attempt to trick or intimidate us into giving the store away. At this point our trust in SST was suddenly exhausted.

Although the document was presented with the information "no changes are possible," we responded with a businesslike letter requesting a few changes in wording to address our concerns: we wanted to split the damages in half, we wanted to be sure that SST's claims were valid, and we wanted to have this chapter closed forever (see our letter to SST of October 31, 1991). We expected a reasonable round of negotiation to follow, but SST's telephone response was that they were only interested in having us sign the unmodified agreement. At this time SST stopped responding to our phone calls except to pressure us for the Live and Cassette-Only tapes, and Mr. Ginn's personal assistant informed us she'd been instructed "not to waste any more time on this." Approximately five weeks later, faced with utter unresponsiveness from SST, their lack of appreciation for our good intentions, and with indications that they 1) expected us to assume full liability for the *U2* damages, 2) would keep all of our royalties without authorization (and therefore, according to our interpretation of the indemnity clause, without legal basis), 3) expected us to deliver new records that now might never be paid for, and 4) had probably attempted to trick us, we reluctantly decided to sever our business relationship with SST (see our letter to SST, dated December 11, 1991). We reasoned that the recording contracts on the Live and Cassette-Only releases were each, in essence, a trade of monies for rights in a recording, contingent upon certain conditions of conduct by the record company, and on the basis of SST's behavior and history of breach of contract regarding our other releases, crystallized by their attempt to make us agree to pay for all of the *U2* damages, we decided we could no longer trust them to

fulfill their contracts. By refunding the money, (which in the case of the Live records was only half of the $7000 total agreed upon; see contract), we would rescind the contracts in order to release the material elsewhere. Note that the contracts have not been signed, and that we are aware of no recording industry custom against cancelling projects for legitimate cause.

We received no response from SST. After some deliberation we decided that the ethical and honorable thing to do would be to repay the $4500 in cash rather than let it be merged with the half of the *U2* damages that we acknowledged responsibility for, and sent a first installment of $200, which was all we could afford at the time (see letter to SST, dated December 31, 1991). There was no response to this letter either, and to date the check has not posted.

If we had known that SST was going to demand 100% of *U2* damages, we would not have moved to release these two new records with SST. All attempts to resolve these issues with SST have been met with a blank wall.

Other Relevant Issues

Above we mention a history of breach of contract by SST in regard to our record contracts with them. This has included, on a continuing basis: cross-collateralization of mechanicals with royalties without authorization; cross-collateralization of royalties and chargebacks across all projects without authorization; habitually late royalty statements; habitually even later royalty checks; and not paying the agreed-upon royalty rate on CD releases. Further, despite the fact that our contract for our *Escape From Noise* album prohibits SST from releasing that material in anything other than the original packaging, SST has released a colored vinyl version of the album without authorization, and has included the *Escape From Noise* track *Nesbitt's Lime Soda Song* in their recent *SST Acoustic* compilation record, a full-price record, without authorization. All of these are serious violations of our rights under our record contracts.

You may be interested to know that at least two artists who have left SST are preparing to litigate against SST over unpaid royalties in the amount of hundreds of thousands of dollars. You may also be interested to learn that Mr. Ginn was recently quoted in the San Francisco Bay Guardian to the effect that he had no interest in suing Negativland (see enclosure).

Please be advised that contrary to Mr. Ginn's statements in the press, Mr. Grigg, Mr. Lyons, and Mr. Joyce are all low-income individuals. Mark Hosler, also a low-income individual and a principal member of the group, was not named in your letter. Further, the Island/Warner-Chappell suit named only Mr. Lyons, Mr. Joyce, and Mr. Hosler. Mr. Ginn has recently misrepresented our financial status in interviews, and appears to base his claims that we are wealthy on misinterpretations of out-of-date biographical material. Negativland is the primary occupation of most of the members of the group, who occasionally supplement their record royalty and live-performance income with part-time jobs. None of us are corporate employees. Finally, not all of the members of Negativland live in California.

In closing, we would like to stress again that throughout this affair we have demonstrated good faith, have responded to communications, and have offered reasonable resolutions to a difficult situation. SST's failure to respond to us or to be willing to negotiate a settlement has been extremely frustrating. We have consulted several attorneys throughout this matter, and feel confident of our position. We would very much prefer to negotiate this matter with you directly, and would hope for a quick resolution, but if we cannot come to terms we may be forced to proceed to a countersuit on the basis of SST's past, current, and ongoing breaches, in which case we would begin to communicate through a lawyer. For now, we are open to proposals and ready to negotiate.

Sincerely,

–Negativland

29. Yet Another Direct Appeal to U2, Delivered During the *Zoo TV* Tour

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

March 10, 1992

Dear U2,

Greetings from Negativland. We realize you are now involved in a busy tour schedule and have been informed that Island's suit against our *U2 Negativland* single has been settled, but we thought we would make this last gasp attempt to communicate directly with you– artist to artist.

If you have heard *U2 Negativland*, you can understand that our stance in this work is essentially a subversive one, and although you as the secondary subject of this "subversion" may not appreciate it, we hope you understand the larger principle of free expression, and the importance of unrestrained dissent. You may not agree with what we're saying, but we hope you will still see the benefits in defending our right to say it, to paraphrase Voltaire. Your silent compliance with Island's action against us has set a harmful precedent for you as artists, and for the music business in general which, when push comes to shove, is no longer motivated by art or ideas, but is now completely under the corporate stranglehold of lawyers and accountants.

We believe Island spent in the neighborhood of $75,000 to suppress our record and recouped in the neighborhood of $45,000 in costs and damages. SST Records sold only 7000 copies of *U2 Negativland* in the time it was out, and may have sold a few thousand more if left alone. This was never a significant threat to your sales, even if we acknowledge the possible confusion our cover design presented at point of sales. We would have gladly changed the cover design at Island's request, but were never given that opportunity by Island who rushed to crush this work completely out of existence.

You have always emphasized spiritual and ethical imperatives in your music and in your decisions to assist various causes and artistic endeavors. We ask you to please consider our situation in the same way. We don't believe that all this could be out of your hands or beyond your control. You remain a powerful force in the world, and certainly at Island Records, regardless of their desire that you ignore us and their action against us. The amount of press, universally sympathetic to our predicament (including continuous updates in *Rolling Stone, Spin, Village Voice* and many more) would give you pause in this matter if you looked them up. The fact that *U2 Negativland* was critically acclaimed by all who reviewed it should have been the clearest hint that Island Records were placing you in an anti-art position with regard to public perception.

We notice that U2 is now taking an artistic risk similar to the ones we are constantly faced with. Your "Zoo TV" concept looks very interesting to us, and in fact puts you in the position of "sampling" the public (copyrighted) airwaves in order to create something new with what you find there. Obviously, you and Mr. Eno are viewing mass communications as the ocean of raw material which artists and everyone else must swim in, and as such, it really is the "public domain." However, every TV business interest with a copyright claim in their credits could dispute your right to do this and probably win. We would like to see the laws begin to be adjusted in favor of artistic inclination for a change, how about you?

Finally, after the settlement with Island, our label, SST, turned around and demanded we pay off the entire cost of the settlement to them. SST have threatened to sue us for all their costs ($90,000). As a result of all this, Negativland is without any income from our past work, and unable to release anything new, independently or with another label. We are stuck in limbo and close to broke in our personal lives. With all this in mind, we would like to try one last suggestion. We no longer have any hope of reasonable consideration from Island, but it is not too late for U2 to exert some influence in this situation. Since Island now owns *U2 Negativland* you might ask that Island return the record to us (not SST). We could change the cover to your approval and continue selling it ourselves independently.

We think such an interesting move on your part would serve us both well, dispersing the various clouds hanging above us at the moment. As artists, not businessmen, we could start trying to have a positive effect in an unwanted situation caused by nightmare executives who would prefer that creative responses stay out of their "real world" machinations. Such an idea has the potential to turn a lot of bad publicity into good publicity for U2, as it would be a rather stunning way to emphasize creativity over money, while saving Negativland from imminent disintegration as a group.

Thanks for taking the time to consider all this. We sincerely hope for response.

Best Wishes,

–Negativland

74 1920 MONUMENT BOULEVARD ME-11 CONCORD CA 94520 510-420-0469 FAX

"Am I bugging you?...I hope I'm bugging you..."

30. Fax from Eric Levine, Island's President of Business Affairs, to Paul McGuinness

March 24, 1992

VIA FAX

Mr. Paul McGuiness
Principal Management
250 West 57th Street
Suite 1502
New York, NY 10019

Re: U2 / Negativland

Dear Paul:

I am in receipt of your fax to Chris Blackwell of March 23 regarding the above. Negativland's request to allow them to release the record themselves ignores an important element - the record features extensive vocal "outtakes" of radio/television personality, Casey Kasem. In fact, Kasem's attorneys have already put Island on written notice that any release of the record by us, or any purported transfer of rights in the record, will be met by a lawsuit. In a telephone conversation with Kasem's attorneys, I was specifically advised that if the record sees the light of day with Island's involvement, Island will be sued as swiftly as SST was sued when the record was originally released.

In short, we must keep in mind that Island does not have the right to exploit or otherwise transfer rights in a record which contains the unauthorized vocals of Casey Kasem. Island's acquiring of the copyright in the Negativland record was solely a means to prevent any party from ever releasing the record.

Of course, I am always available to discuss the matter with you in greater detail.

Best regards.

Sincerely,

Eric Levine
Vice President
Business Affairs

EL:lr

cc: Chris Blackwell
Tom Hayes
Andy Allen

ISLAND RECORDS, INC. 400 LAFAYETTE ST., 5TH FLOOR, NEW YORK, NY 10003 TELEPHONE 212-995-7800 FAX 212-477-5918

'Brilliant' lawyer beaten to death outside his office

AMC 6SF 1:05 p.m., "Hunt the Man Down" ('50) ★★

@@ 2 p.m., "SST: Death Flight" ('77) ★★

SHO 2 p.m., "Who Framed Roger Rabbit?" ('88) ★★★★

LIF 4 p.m., "My Body, My Child" ('82) ★★

AMC 6SF 2:15 p.m., "Mademoiselle Fifi" ('44) ★★

MAX 3 p.m., "Shockproof" ('49) ★★★

31. Interview with Casey Kasem

The following interview with Casey Kasem took place during a concert at a protest against nuclear weapons testing outside Las Vegas in April of 1992. The interview was conducted by Doug Jablin of KUNV radio in Las Vegas, Nevada, and Diana Arens of KAOS radio in Olympia, Washington. Casey was the emcee who introduced the bands.

Q: *Could you tell us about your involvement with the 100th Monkey anti-nuclear group?*

Casey Kasem: I've been involved with the 100th Monkey since Rick Springer called me up and asked if I'd do some emceeing with the event today, and of course I said Yes because I've been up to Mercury, Nevada before, I've been arrested a couple of times here and in Washington, D.C., and I'm very much opposed to nuclear testing, to any kind of nuclear activity whatsoever. We don't need nuclear power. We have plenty of alternative power. Ever since I read Helen Caldicott's book *Missile Envy* and got involved with The Great American Peace March in 1986 I showed up in four different sites and held fundraisers on the radio for that group. I also marched in the Soviet Union in The March To End An Arms Race Nobody Wants (in 1987).

Q: *Do you find yourself being split between two worlds, the commercial world and the alternative, political, non-commercial protest world?*

CK: No. I find that one helps the other. I think without my credibility I might be less effective. The credibility that I may have achieved through the commercial area of broadcasting I think makes me, as a so-called celebrity, someone who can bring the attention of nuclear testing and nuclear armaments to people who might not ordinarily want to hear about it. Sponsors have never said anything to me, to tell me not to do anything, but I don't do it on my show. If I did that, that wouldn't be fair, that's bringing politics to a music program, but whenever I'm speaking publicly outside of that, I've been very outspoken.

Q: *One of my other questions involves Negativland, their U2 album and their use of the sample of your voice. How do feel about that? Because you didn't sue them.*

CK: No, I didn't sue them. And I choose not to call attention to it simply because that would only be doing them some good, but I understand that most of them are off the market and I've never criticized anybody for playing it, I've never called a radio station and said "Don't play it." They can play it if they want to. But what it does is it, uh, unfairly misrepresents me, because that was something that was recorded by an engineer who knew that when he gave it to another engineer eventually it would become part of the mainstream and eventually it would be played on the air. That was something that was personal, something that I don't believe should have been played on the air, but it has been and there's no harm done and...onward and upward!

Q: *What do you think that Negativland was trying to do? It seems like you have a right to complain about it.*

CK: No, I'm not going to complain about it, it's a free country and we have the First Amendment so...no problem, no problem. I'm against censorship of any kind. Even Casey Kasem. If they want to censor me, fine. But that's not fine. You can't censor me because I believe in the First Amendment. Nobody should be censored.

32. Letter from Kasem's Attorneys

LAW OFFICES OF
ARMBRUSTER, ADLER, BRISKIN & GLUSHON
A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
2029 CENTURY PARK EAST
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LOS ANGELES, CALIFORNIA 90067
TELEPHONE (310) 201-0507
TELEX 181-041 · TELECOPIER (310) 201-0344

April 29, 1992

Negativeland

Oakland, California 94618

Re: Casey Kasem

Dear Negativeland:

We represent Casey Kasem. This letter is in response to your April 21, 1992 letter to Mr. Kasem whereby you requested Mr. Kasem's permission to have the U2 Negativeland single returned to you for release in some fashion.

This letter is to inform you that Mr. Kasem will not grant such permission and will pursue all legal remedies available to him in the event you release the U2 Negativeland single again or in any way use the unauthorized outtakes of Mr. Kasem from the American Top 40 Radio Show.

Furthermore, we are sending a copy of this letter to Island Records so there can be no mistake about this matter.

Sincerely,

ARMBRUSTER, ADLER, BRISKIN & GLUSHON

MARK S. ARMBRUSTER

MSA:kg

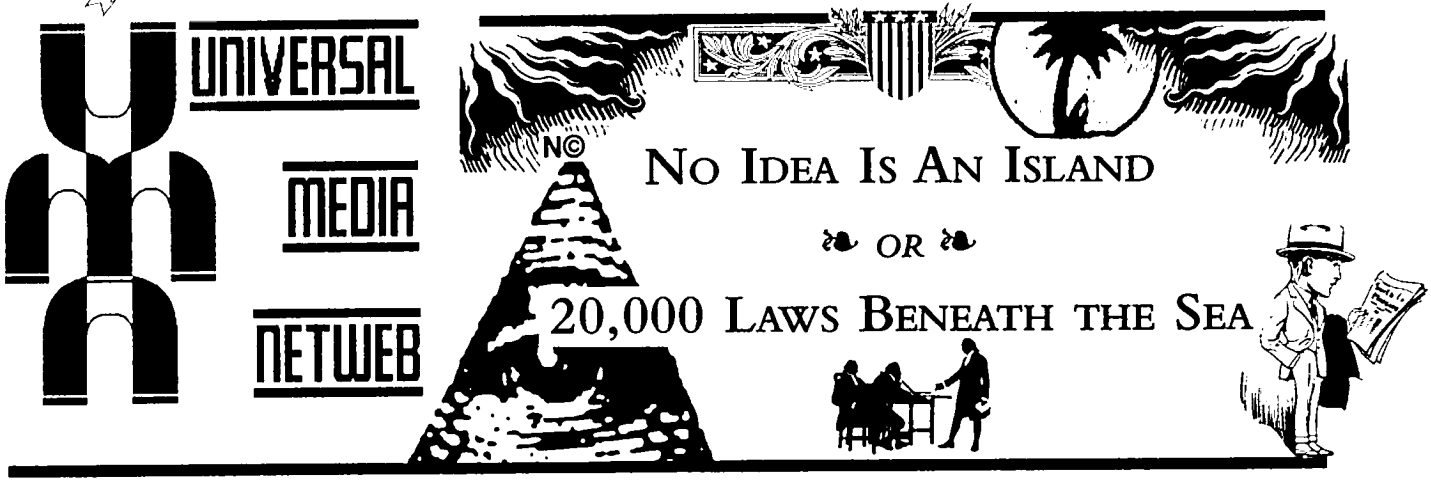
cc: Mr. Chris Blackwell
Mr. Eric Levine
Mr. Paul McGuinness
Mr. Casey Kasem

MSA\KASEM.U2

33. Negativland's Fifth Press Release

FOR IMMEDIATE RELEASE

DATELINE: HOWLAND ISLAND, JUNE 20, 1992

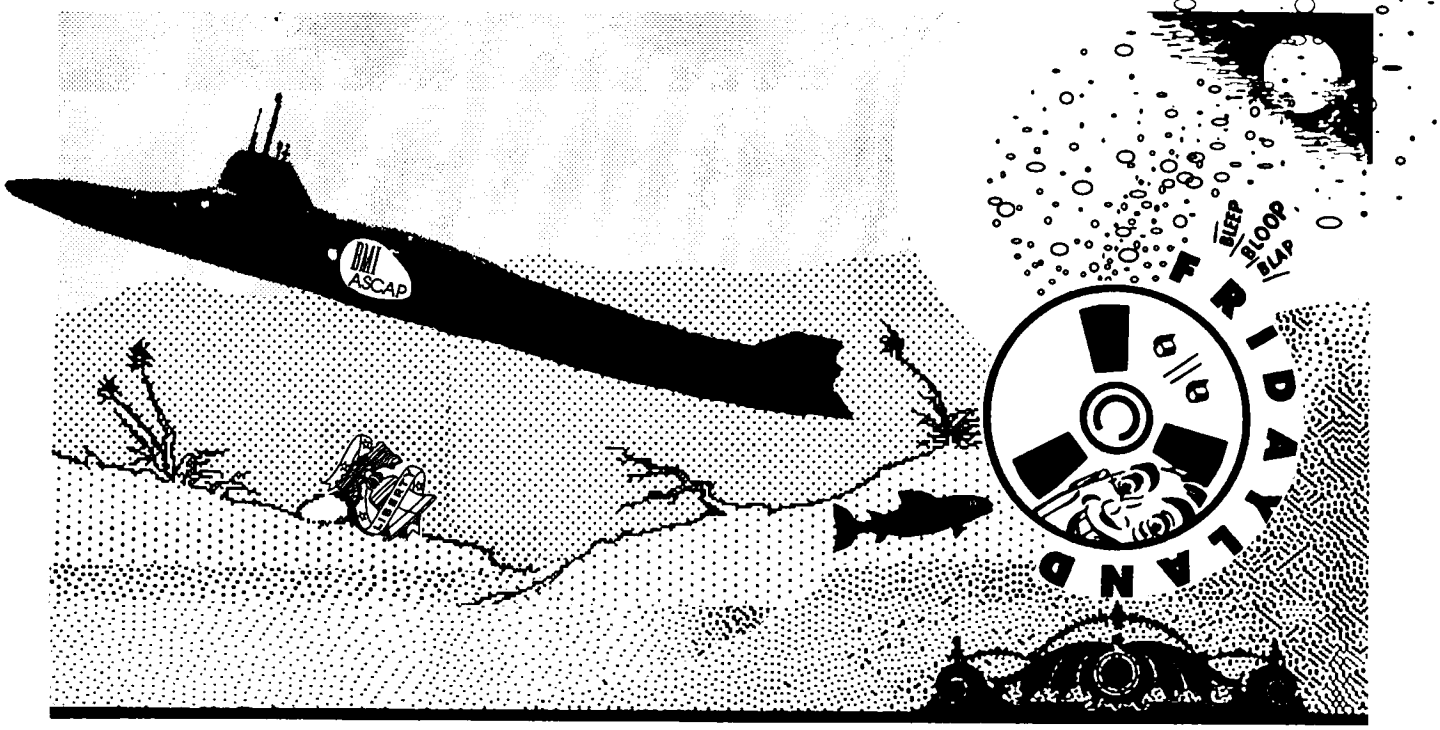


Sleek and silent, the huge torpedo-shaped submarine hovers next to the mammoth underwater hydraulic lift columns beneath the 17-acre platform on which Howland Island sits. Inside the sub, two junior executives from BMI and ASCAP sit watching a small TV monitor as it tracks the progress of several deep sea divers making their way toward Howland's huge hydraulic maintenance dome on the ocean floor. They chat to pass the time as the tool-laden divers do their tortuous underwater moonwalk towards their target. *"I dunno, Ralph, I've been calculating the costs here, and even with the diver supplied by SST and the two by Island Records, when you figure the costs of our divers, the sub, all the supplies, etc., this is ridiculously expensive, even for a joint operation. I hope it's necessary."* *"Hey, Burt,"* says Ralph, *"This expense is nothing compared to what's at stake. Like your job, for instance."* Burt reaches for the contrast knob to clarify the picture. *"Maybe,"* he says, *"but I still think we have nothing to worry about. These guys don't have any real clout, not where it counts. The law's on our side. Congress has always been perfectly willing to believe our lobbyists. What's going to change that?"* Ralph points to the monitor. *"Look where we are! If Friday can afford this, don't you think he can afford just as many lobbyists as we have? He wouldn't be the first off-shore interest to get those campaign fund addicts to change the laws."* Burt shakes his head and launches into his imperfect impression of The Weatherman's voice. *"But Congress is stupid, really dumb. They don't care about art issues; they want rich people to succeed. They want art to get out of the way so rich people can succeed..."* Ralph stares at Burt as a first tiny crack appears in the shell around the seed of suspicion which has lain dormant in his brain concerning Burt's true allegiance. *"C'mon Burt, art schmart. Nothing happens until somebody sells something! Look, if Friday and these Negativland pirates can keep up their anti-copyright law publicity long enough to actually make an impact on public sentiment, we could lose our influence in Congress. Those chameleons will go along with any trend, even this 'Art before Profit' bologna, if they think it will get them re-elected."* *"Oh, probably,"* shrugs Burt, *"but what chance of that are we talking about? These appropriation artists are a drop in the culture bucket. All the artists who sign on with us are eager for whatever royalty and clearance kickbacks we can get them. They expect it. They all want all that secondhand income as much as we do. These appropriators will have as many artists against them as they will publishing and business interests. As long as we keep stressing our role as art protectors and guardians of the economic interests of artists, we'll do fine in Congress. They've gone along without question up to now, haven't they?"* Ralph leans forward in the eerie red submarine light, *"It's the press and the media that could turn the tide, here. They seem to enjoy promoting all this anti-establishment stuff Friday puts out. He's getting easy access..."* Burt takes another sip of deep–brewed coffee, feels an inexplicable urge to imitate The Weatherman again, but thinks better of it. *"Any controversy gets easy access–for a while,"* he says instead. *"The music press will line up with us if the chips are*

down. Their survival depends on advertising from all the people who agree with us. That's the thing, we've been doing it this way for a long time. We're securely entrenched, and nobody can really afford to upset the established parameters of copyright income without jeopardizing a whole industry-wide network of income based on cultural property ownership. It's thoroughly American, now. If it ever gets to Congress, they'll stonewall it. Remember, they're all lawyers too."

Ralph leans back, the tiny crack in that seed in his brain closing up for now, *"Sure, precedent and preeminence are good for a lot, but then again, Congress never had any alternative point of view to contend with either. So let's make sure they don't."* Then they both squint together as the highly paid divers ignite their carbon arc torches and begin tracing a large circle on the wall of the hydraulic maintenance dome.

The darkest hour is just before dawn. C. Elliot Friday massages his brow with the always-gloved three fingers on his left hand, while studying the graphic layout of the latest *Art before Profit* poster before him. It's late, almost dawn, and his peacock down bed beckons for his complete attention. Behind him, the huge oval porthole in the wall of the Found Sound Foundation's situation pit is still black, flickering occasionally with the silver glimmer of a passing fish. In front of him sits his staff of found sound strategists. *"Gentlemen,"* he concludes, *"I like it. However, I would add a few more visual references to BMI and ASCAP, just to emphasize the major role they play in maintaining repressive copyright restrictions at the Congressional level."* He pauses for a quick round of *"OK, Can Do's"* by revolving 360 degrees in his swivel chair, but stops at 180 degrees. Facing the large picture porthole, he notices the first grey light of dawn now filtering down from the surface. *"Ironically, gentlemen, it's time to rise,"* he muses, as he turns to open the master Howland control panel on his priceless Cubist desk. The button which sounds the rise alarm and sends the submerged island to its daylight position on the surface is pushed. As the rise alarm drones on, the tired eyes of the strategy staff begin to widen with their own alarm as everyone realizes together that the island is not rising. Mr. Friday revolves again to see a large Pacific Sea Sucker, stationary at the porthole, lazily grinning at him. The staff has never considered a strategy for this contingency and the first hints of panic set in. *"We're stuck on the bottom!!"* seems to be the most repeated phrase among them as Mr. Friday hurries from the room to find out exactly how long the island's oxygen supply will last.



34. Negativland Interviews U2's "The Edge" for *Mondo 2000* Magazine

In June of 1992 U2's publicist in L.A. contacted *Mondo 2000* magazine on behalf of the group's guitarist, The Edge, with the idea of doing a rare interview concerning the group's *Zoo TV* tour and its use of technology. *Mondo* editor R. U. Serius then, without The Edge's knowledge, contacted Don Joyce and Mark Hosler of Negativland with an invitation to participate in the interview. On June 25th Negativland joined R. U. Serius to await the following call from The Edge in Dublin.

R. U. Serius: So you had some stuff you wanted to talk about?

The Edge: Well, I just like the magazine. I've seen a few issues. And it's just so boring, the usual magazine kind of angles, so well-trodden. I just thought you might have an interesting angle on what we're doing which would be a little bit more imaginative.

Mark: I got the idea from talking with R.U. Serius that you were interested in talking about the impact technology is having on people and cultures.

E: Our position is a very unique one. We are a very big band. We have access, technology, access to the airwaves, be they TV, radio, or whatever. We're a little more relaxed at this point in time about being a big band, because we've turned it into a part of the creative process. We're actually using our position in a way that gives us a certain amount of amusement. It's turned it into part of what we do. A few years ago we were almost uncomfortable with the idea of being a big band. It seemed like maybe coming from where we did and being interested in the things we were interested in, it seemed like a bit of an anomaly, a bit of a contradiction.

M: Was it like you were trying to reconcile what you were trying to do when you started and what music was to you then, and then look what it's turned into?

E: It was *so* different. When we started out we were very influenced– this was '76– the whole punk thing of start again, wipe the slate clean, and *vitality* was where it was at. No one was really thinking very much. It was really about making the statement *now*.

M: If you look at the equivalent, you're the next big thing that a bunch of kids could say, "Let's tear that down."

E: Sure, yeah, I think that's part of the whole regenerative thing of rock and roll and I think that's really important. We were that then, and now we're in a position where we *are* big, and we want to do something with this position that's interesting, and that's imaginative, and I suppose that's the right amount irreverent, and we're not taking our position seriously in that sense. We're actually in a way being kind of subversive, and just manipulating it. The whole *Zoo TV* thing, the access that being where we are gives us, has given us a lot of enjoyment. We're playing around...we've got TV specials coming up which are really hilarious. We did this satellite link-up with MTV where we beamed our show into somebody's front room. The possibilities are only beginning to present themselves.

M: I think what you're saying sounds great. If you get to a position where you've got the power, the money to do something, and you still maintain this idea of exploring and doing something interesting and fun, that's really great. But it seems like when you get to be a certain size– you're an international cultural phenomenon– and it seems like a lot of what you're doing, when you look at it and analyze it, might be pretty subversive...but it ends up being lost on a huge number of the people who are following what you're doing. They're more following it as a surface thing: What's the new Top 40 hit from U2? I don't know if that's something you just realize, and it's part of what it is...

E: Yeah. We're not shy about being big anymore. I think rock and roll *should* be big. It's about mass communication. The idea that it's kind of a cult thing and that it's underground is all very well, but it's shame if that's all it ever is...that the majority of the airwaves are dominated by music that's purely commercially motivated and does not go beyond that, but is essentially one-dimensional. We're in a position where we can do some more wild things and I would think it would be a shame if we just accepted the standards and the way that most bands go about their business, and didn't use this position in a different way.

M: I wanted to ask you something more about the *Zoo TV* tour. One thing that wasn't really clear to me– you have a satellite dish so that you can take stuff down live off of various TV transmissions around the world?

E: Yeah, essentially the system is, like we've got the big screens on the stage which are the final image that's created. Down by the mixing board we've got a vision mixer which mixes in, blends the images from live cameras, from optical disks, and from live satellite transmissions that are taken in from a dish outside the venue. So the combination of images can be any of those sources. We've also incorporated telecommunications. We've got a telephone onstage that Bono occasionally makes calls from the stage and occasionally calling the White House or ordering pizza or whatever...um, phone sex...

Don: So you can kind of sample whatever's out there on the airwaves...

E: Yeah, it's kind of like information central.

M: One thing I'm curious about– there's been more and more controversy over copyright issues and sampling, and I thought that one thing you're doing in the *Zoo TV* tour is that you were taking these TV broadcasts– copyrighted material that you are then re-broadcasting right there in the venue where people paid for a ticket– and I wondered what you thought about that.

D: And whether you had any problem, whether it ever came up that that was illegal.

E: No, I mean, I asked the question early on– is this going to be a problem?, and apparently it, I don't think there *is* a problem. I mean, in theory I don't have a problem with sampling. I suppose when a sample becomes just part of another work then it's no problem. If sampling is, you know, stealing an idea and replaying the same idea, changing it very slightly, that's different. We're using the visual and images in a completely different context. If it's a live broadcast, it's like a few seconds at the most. I don't think, in spirit, there's any...

D: So you would say that a fragmentary approach is the way to go.

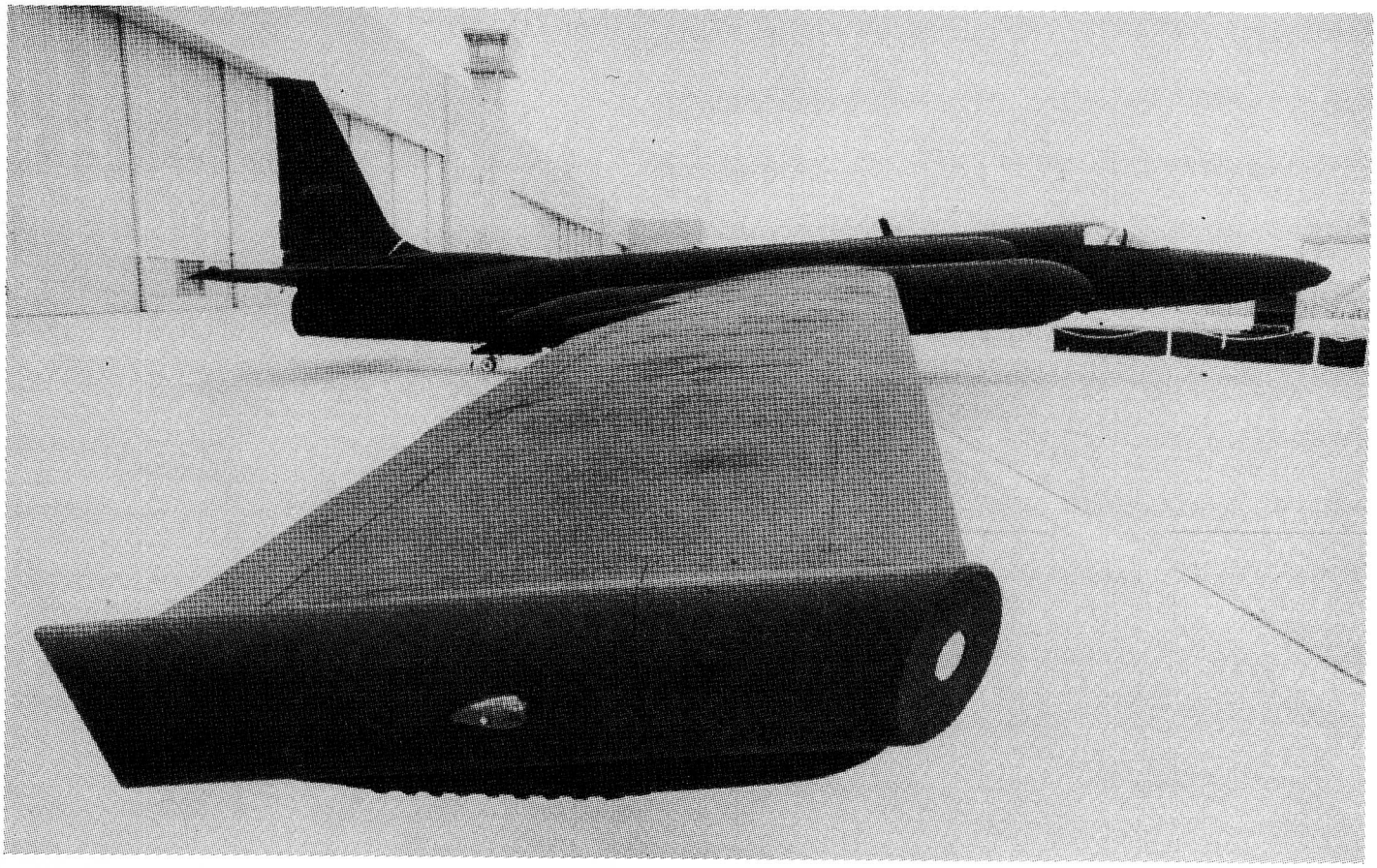
E: Yeah. You know, like in music terms, we've sampled things, people sample us all the time, you know, I hear the odd U2 drum loop in a dance record or whatever. You know, I don't have any problem with that.

D: Well, this is interesting, because we've been involved in a similar situation along these lines...

RUS: In fact, maybe it's time for me to interject here. The folks that you've been talking to, Don and Mark, aside from being occasional contributors to *Mondo 2000*, are members of a band called Negativland.

E: Ahhhhhh!

RUS: And I figured– I know they've been sued by your record label, but they hadn't been sued by you. So I thought we could engage in a conversation. And I know you might feel



like we're out to surprise you or sabotage you, but just to engage in...

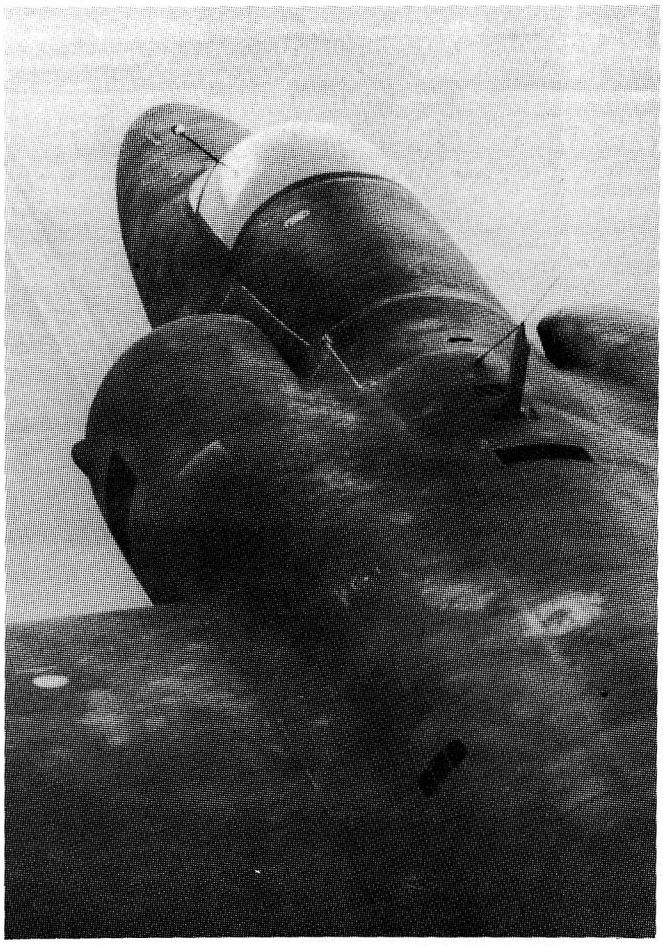
D: But anyway, we were sued by Island for a very fragmentary sample of one of your records.

E: Yeah.

M: We ended up sending some packages of stuff along to you and some letters, and I don't know what kind of communications you personally ever got about it.

E: Yeah, well from what I can remember, I can't remember the exact sequence of events, but as it was presented to us, you know, "Here's the record, here's the album sleeve, Island are already on the case here, and they've objected because they feel it's, because of the artwork, this is at a time where a lot of people are expecting a new U2 record," and they felt that, from their own point of view, in a pure business sense, nothing about art, I just think they felt there was a chance that people would pick up the record in a record shop and think, "Oh, this is the new U2 album."

M: But that actually was...I mean, in the context U2 is in, *you* have an idea of doing something that's subversive, and we're scurrying around way down low in the underground of music, and we're doing things that *we* also think are somewhat subversive...but the thing that we did was– You know, the lawsuit from Island dealt with this as if it was a consumer fraud that was intended to rip off innocent U2 fans, and that we were somehow gonna make millions of dollars by selling these records. And of course it didn't acknowledge that there was any– they may not like the artistic intent of the record, you know, you and your band might be offended by what we did, but no one ever in any way acknowledged that the record was anything else. And yet, actually, when you look at the cover and you listen to the record, look at the whole package, there's a U-2 spyplane on the cover and stuff– it's pretty obvious that this is actually an artistic statement...again, you may not like it, but it's a *statement* about something.



E: I wasn't, I didn't have any problem with it. I think Casey Kasem could have. I mean the problem really was by the time it really, by the time we realized what was going on it was kinda too late, and we actually *did* approach the record company on your behalf and said, "Look, c'mon, this is just, this is very heavy..."

D: Oh, what did they say?

E: But at that point, on the point of principle, their attitude was, "Well, look, OK, we're not gonna look for damages but we, we're not about to swallow our own legal costs." The way it ended up, they were looking for *costs*, not damages.

M: Right, but what happened, we didn't get a phone call from Island saying, "Look, we're pissed. We don't like what you did. Our band has a new album coming out and you better pull this thing or we're gonna smash you." They didn't give us any chance to do *anything*. The first thing we heard was, ten days after the record was out, there's a 180-page lawsuit.

E: Wow.

M: So it was like there was no negotiation and they went ahead and were spending, you know, they've got 400-dollar-an-hour lawyers.

E: Yeah.

D: See, you're quite right about their main concern being the cover rather than the content, we always felt that and I think that was obvious from their lawsuit, the way it was worded, but they never came to us in the first place and simply said: "Change the cover."

E: Yeah.

D: And instead they just smashed the whole thing including the content...

E: Yeah, really. I think we would have reacted in a different way, but the lawsuit was not our lawsuit. Although we have some influence, we weren't in a position to tell Island Records what to do.

M: Well, that's one thing we were always wondering: Is that really true? Or: OK, if U2 sells 14 million copies of an album for a label, and you're the main thing that keeps Island Records in business economically, then *don't* the artists?... You could see how we would think that you would certainly have the leverage to...

D: Yeah, why can't the artist have more influence over the label, do you know?

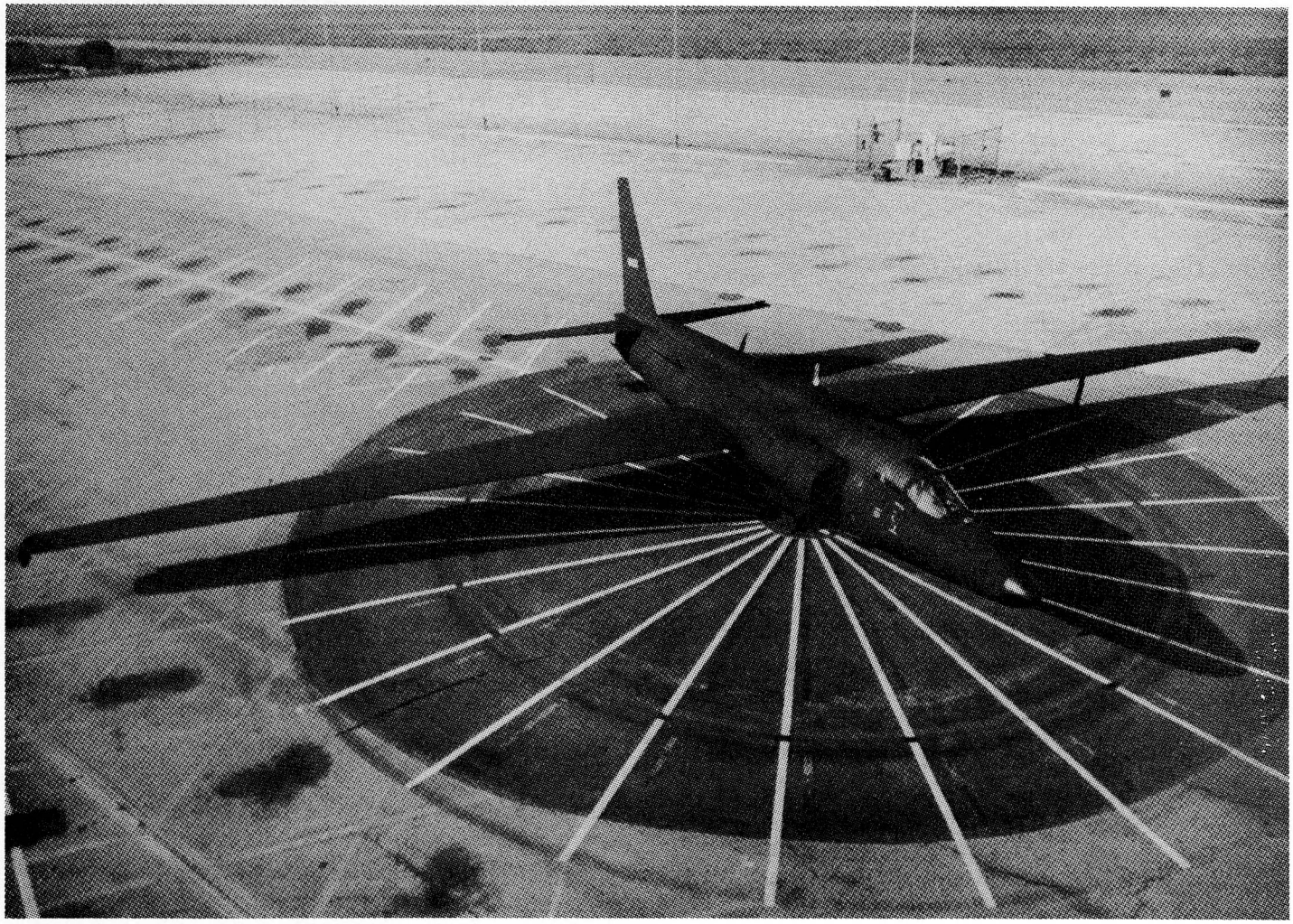
E: What may have happened is that theirs was a knee-jerk reaction at a moment when they were expecting the album to be delivered, and they were probably, maybe after the event, they were way down the road before they really took a proper look at what it was, but I think they felt...

D: You know, we've had contact with Island throughout this, trying to get them to adjust their position or pull back or not go any further, and actually they *did* keep on this right up to the point of...

M: Yeah, one of the things we tried to make clear actually to– we sent some faxes to [Island V.P.] Eric Levine and [Island President] Chris Blackwell and [U2 Manager] Paul McGuinness– we said: Look, ya know, it's one thing, we could have canned the cover, that's one thing, or we could have even stopped making the record and Negativland would have paid SST for the costs of destroying the copies that are still in the warehouse, but then what happened, of course, is they went after not only all these records, but they kept using the lawyers, and then they went after the money. We made it very clear to Island and to Paul McGuinness that our label was going to turn around and come after all that money out of us, that in the end Negativland would pay for absolutely every cent of it, and SST says it's $90,000. You know, you may spend $90,000 on ordering pizza at a show for your fans, but for us...

E: Ha ha ha ha...

M: We haven't made that much money in 12 years as a band, right? So there's a difference between just sort of putting a stop to something, or a smashing attack with a sledge hammer.



E: I know...

M: And that's the thing we were trying to communicate.

E: Well, listen, when we heard this idea that you and SST had fallen out, and that this was no longer record company to record company, that it was like *you* were losing money, so we actually discussed the message that you wanted the records given back to you, I mean I was up for that, but then I heard that Casey Kasem was not, that he actually wanted to stop it...so it's all become a big mess.

M: The thing that was interesting about Casey was that Casey in public was questioned about our single and he said, "Well, I don't like what they did, it's embarassing to me, but I'm for free speech..."

E: Yeah.

M: "...I'm against censorship, I'm for the First Amendment, and I think people should be able to do what they want," and then privately he said: No, I'll sue your ass if you try to put it out.

E: Ha ha ha ha...

M: So the thing that's been interesting to us in this whole thing is that we were working for a record label that was very much outside the mainstream music industry, so we're dealing with SST, with U2, with Casey Kasem, all people who– we're really looking at what people's public persona is versus private, and we've been of course always wanting to somehow have some contact with U2 to find out what really happened.

E: You know, you should have tried to make contact first...

D: But we can't get to you!...

M: That's the thing. You are insulated behind so many layers of management and publicity firms, and SST actually *did*, they told us they contacted Warner/Chappell Publishing anonymously before the record came out about possibly even sampling clearance rights and they were told, "No, U2 simply never grants that..."

E: Ah, that's *complete bollocks*, there's like, there's at least *six* records out there that are direct samples from our stuff.

D: But they may not have been granted by Island.

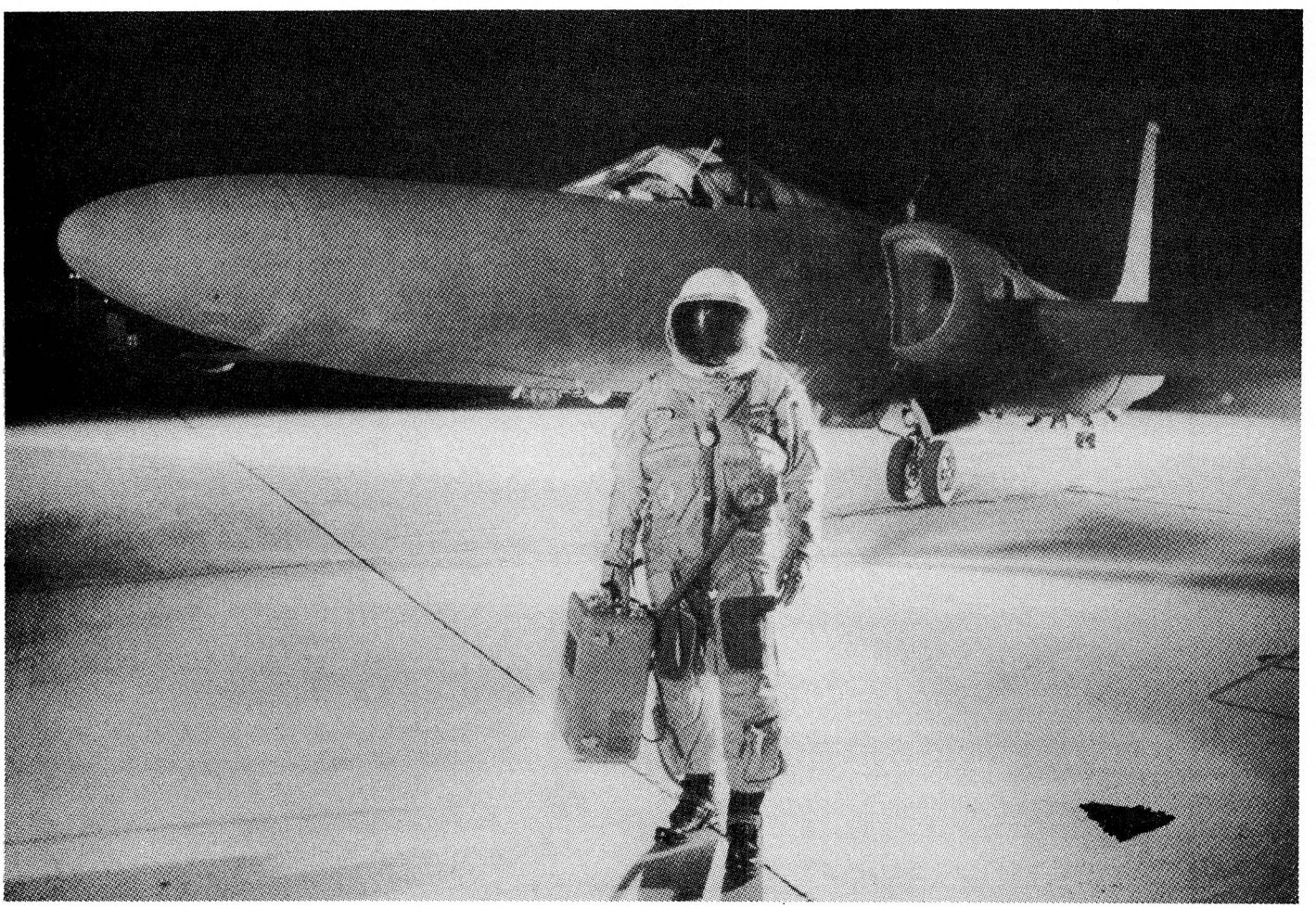
E: Well, they must have been, because some of the records...There's a thing called *New Year's Day* which is a dance group, basically around the *New Year's Day* bass part and drum part so that's not just a sample...*[i.e. the producers must have had access to the multitrack master tape to get those parts separately]*

M: The other feeling we had, which we were kinda talking about earlier with the *Zoo TV* tour, was we said: Look, a long time ago when artists were– artists are always reacting to their environment right? You're always doing something that's reacting to the world you're in, so what are the tools or the technology you had a few hundred years ago to do that? Well, maybe you had a paintbrush, you had a piano, a lute. You could interpret things that way, and the way we see it now, and it sounds like perhaps you agree, is that now the technology is simply different and now it happens that instead of just making a painting of something I can take a photograph, a video, I can make a xerox, I can make a sample...

D: It's capturing...

M: ...And you can *capture* it, and our environment is– and it's something you're suggesting in the *Zoo TV* tour too– the environment is this media-saturated thing that we live in.

E: Yes.



M: And to us it was like, on the one hand I know that U2 is a bunch of guys just trying to make some music, but at another level, U2 is part of the media environment we live in, you know, I hear your songs playing in the shopping mall in the background when I'm shopping, whether I want to or not.

E: Yeah.

M: And so for us to ask permission to do something that's in response to the environment we're in, which is something McGuinness said to us very early on: "Oh, you should have asked us"– and we sort of felt from a business standpoint, that's one way– but from an *artistic* standpoint, we felt that No, we don't need to. This is just the world that we're in.

D: See, your response to sampling is the absolutely correct one, I think, which is: if it's fragmentary it's OK, no one should really worry about fragmentary appropriation of *anything*.

E: Yeah.

D: You know, the public domain is actually, literally the public domain and if it's in it, let's use it. And we're against bootlegging entire works completely– that *is* ripping people off– but the idea that all this stuff is out there surrounding us, and we're swimming in it, the idea that it could become part of your own work is perfectly appropriate and, in fact, *necessary* as a kind of self-defense against the coercion that media has become...and yet the business end of it, your label and every other label, has an archaic view of this, based on their own ownership of all that culture.

E: Yeah.

D: And so part of what we're about now, especially since our own lawsuit, is to bring all this out in some way, even to the point of changing the copyright laws, which is what *I'm* onto right now– I would really like to relook at the copyright laws in this country and the way that you can't even sample two seconds of something because it's *owned*. I think it's totally wrong, and has to be changed in this age of new technologies that are basically about capturing things.

E: Yeah, well, technology has really paved the way for this. We're in a new era. The technology is the means to create in music...

D: But the laws have not caught up with that at all.

E: Absolutely, yes. I mean ultimately it does no one any good if creativity is stopped because record companies are losing money. I suppose the fine line is between where a sample or using somebody else's work is pure theft and plagiarism, and where it becomes a legitimate new thing, and that I suppose is where whatever new legislation, that's where it's really going to be difficult to be clear.

D: I think it's going to be akin to deciding whether something is pornographic or not, it's going to be the same kind of tricky definitions there, but I've come to the conclusion that, actually, I would make the defining guideline in the law be whether or not it's, in effect, a bootleg of a complete, self-contained performance, or whether it's a fragment, any part. I would just say using any part, but not the whole, is OK. Now of course you'll get to the point where someone would try to exploit that definition and use all but the last ten seconds of a song, but that's a case for the judge to say "No, you're really just pushing it there and that's wrong." Like pornography, they can make a decision about that. But to me, I'd like the law to say that any fragmentary use of another person's work is free– absolutely free, and they don't have to pay royalties, and they don't have to pay rights, and they don't have to get permission. They can just use it because it's there.

E: Yeah, I'd be up for that.

D: And that would just be part of working in the public domain. If you're going to be a public person and put things out, you can make all the money you can off your own work, but you don't control it to the extent that no one else can make any use of it. That's what I would do.

E: Yeah. I mean, I know of dance records, you know, I've heard them in clubs and on cassette, that can never be released because the bills that would have to be paid...

D: That's true with us, too.

M: We've been doing stuff using bits of, not so much music really at all– actually the *U2* thing is actually one of the only times we've really used a lot of someone else's music and then it was only because it was part of the concept– but we've always used lots and lots of voices from radio and television and stuff found in used record stores, and we realize the way that we work– I mean, on our records we literally have hundreds of different little bits of voices all put together– and how could we take the time, or ever have the money, or the ability to find out where they're all from, and pay everybody? And what's happening lately with all these lawsuits, now I guess all the labels are becoming even more scared about sampling infringement. It's like they're totally clamping down on a whole way of working with sound.

D: They're all caving in, absolutely caving in. Anytime a lawsuit comes up, the label apologizes and capitulates and says, "We're sorry," and no one is fighting the law, saying the law itself is unreasonable.

E: Yeah, well, I don't know what to say really, I mean I'm only interested in the spirit of what it is, not the legality.

D: Here's the thing, though: *you are hooked up with the legality*. You are in partnership with someone who's taken an opposite point of view, and *I'm* wondering: What the hell can you do with your influence and your power as a group to effect some changes? Because this has destroyed us as a band, we're now absolutely with no label, and with no money, and with no opportunity to put out anything else.

M: One thing that's happened is that our label is turning around and is taking the royalties from every record we've ever done, so we're not making *anything*. The last six or seven years of work is down the drain. There's no money, there's nothing. And now they're going to sue us. And of course Island isn't responsible for what SST Records

decides to do, but we did make it clear all along in letters to Levine and Blackwell that, look, *these* are the repercussions of what's happening, and do you want to be in that position with what you're doing? Because you're not just stopping a record, you're actually economically destroying a band.

D: And the really stupid thing is, it was done about the *cover* but they succeeded in crushing the *art*– and they didn't seem to know the difference or care about the difference.

E: Yeah. What interests me then is whose responsibility is the cover. I mean you provide the music, but...

D: We did the cover. We designed the cover and it's true, we were very naive, and we *were* trying to actually make it look like a U2 cover to an extent. They're absolutely right on that count. It *is* a deceptive practice, no doubt about it, and we wouldn't have argued that. We would have changed the cover if they'd asked us to, but they never did. They never even asked about that. They just had this sledgehammer approach which is based on being so big and so rich that no one can fight them. And that's exactly what they did. They threatened to go to court, we couldn't afford to go to court, so actually, it's just a question of money winning. Not points, no principles, it's just that they had more money to waste then we did, so they could win. That's what they did. That's what really bothers me about this. The whole issue of the content, and the integrity of the art, and the integrity of the idea that free speech is part of art, and that no matter how offensive, it should be able to be out there– none of that was able to even be brought up because they didn't like the cover, so they squashed the whole thing, as if it was all the same, just a matter of money.

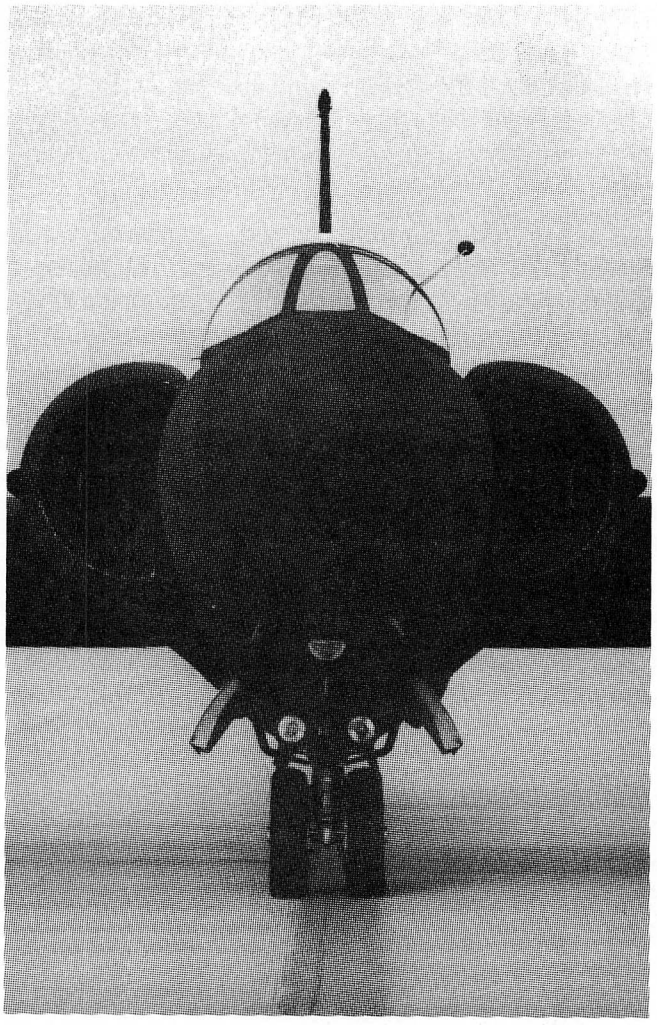
E: Yeah, well, you're dealing there with a company. That *is* their thing, it *is* about business. As it happens, Chris Blackwell is a great supporter of young bands and he generally would be on your wavelength. So, I mean, I can't speak for Chris because, although I read his letters, I didn't speak to him personally about this. But I got the impression that it was difficult to understand quite why he jumped the way he did.

D: I don't either, and I got the impression that even after we had explained some of this to him it didn't make any difference. They were committed, the wheels were rolling, the paperwork's been done...

M: I had the feeling that it was like some executive made the decision and once it was decided, that executive couldn't lose face by turning around and saying "Oh, I guess I made a wrong decision."

D: A typical bureaucratic mish-mush there, but that's... Here's my point: Artists hook up with these people, in my mind unfortunately, and so: How do you correlate *your* attitude, which is about the spiritual imperatives of music, with the company's attitude which says, "Oh yeah, that's fine," and then actually...

[Phone disconnects]



All: Hello?

E: Hi, we got cut off there.

D: Thanks for calling back.

M: Alright, good points for you!

D: Oh, so I was making the point about the artist and the company, and how they're inevitably linked up in the way that the business is set up...and yet their motives and their priorities are *completely* opposite, and how do you reconcile that? Do you just say "Well, we really can't control that," or why the *heck* can't we say, you know, "I'm going to *try* to control that, I'm going to *try* to get in there and have some influence and change that attitude and have some effect" ?

E: Uh, this has never come up. Obviously there's a conflict there, but in the way that you set up your dealings with the record company, you protect what you think is important and you leave them to take care of the aspects of their business that they need to be in control of.

D: Yeah, but you see what happened now?

E: You protect yourself in your, what you're trying to do, but, you know, we've never, until now, felt like we have to also be in control of situations that didn't involve us. It's never come up before.

M: One thing is that the sheer size of your group and the

scale at which you're working means that just to be able to function from day to day you're gotta have a lot of different people working for you, and I assume that Paul McGuinness is a big part of filtering things out and communicating what he thinks you need to know and keeping out what he thinks you don't.

E: There's a bit of that, um...

D: Edge, I think there's a lot of that.

M: It seems like, yeah, there could be more layers around than you realize when you're in the middle of it. From our perspective, trying to get through to you...

D: It can't be done.

M: Yeah, it was made out to be– Blackwell and McGuinness were acting as if this was a simple thing, you know...

E: Well, to be fair to ourselves, we do spend hours and hours dealing with requests and connections that have been made. So we do see most of the things that come into the office.

M: Well, that's good.

E: I think if you had made a direct approach I'm sure we would've, it would've come to our attention. I know something like Negativland, it would've needed to have been pitched in some way for us, or for any of our people to fully understand what was going on.

D: Edge, what if you went to Island and you said: "From now on, I want you to let anybody sample our work who wants it, for nothing." What do you think they would say?

E: Well, I'm not sure we can make a judgement like that...

D: It's your music...

E: The deal that we have is that we sell or we rent the use of the copyrights to somebody else. That's the whole idea of having publishing and record deals. They have the right to exploit our work.

D: But you sign a contract to do that. What if in the next contract it said you're going to *allow* sampling?

E: OK, maybe in the next contract...

M: But right now what that means, Don, is it means that they not only have the right to exploit it, but that gives them the right to protect it...

E: They would see it in very simple terms as they're just protecting their own property.

D: Yes, I know, and yet it...We aren't the only ones, it's happening all over, all these sampling lawsuits have essentially the same effect. They crush an entire work for some two- or three- or ten-second thing that's within it, and so the whole thing goes down because of this...

E: Again, I'm not sure, I don't imagine Island was upset about the sampling aspect.

D: Well, they said they were.

M: But the thing you do in a lawsuit, you throw in everything you can think of. They even accused us of defamation of character by associating this foul language with the clean-cut image of the group U2!

E: Ha ha ha hee hee ha.

M: They did!

E: Wow...

M: Actually, if you ever read the original lawsuit, it's actually quite funny.

E: Yeah. I mean lawyers are a completely different breed, aren't they?

D: Yes, but they're running the show! Those lawyers are running these record companies...

M: Have you ever heard of the book called *Hit Men* by Frederic Dannen?

E: Yes, I actually have a copy but I haven't read it yet.

D: Read it.

M: You should. I've always basically known that the music industry was fairly corrupt, but this book is terrifying...

D: The artist is a victim in the music business.

M: Cannon fodder.

D: He's the last guy to know and the last guy to have any recourse. These business people have it all their own way.

E: Yeah.

D: It's always been that way and it hasn't gotten any better.

E: The funny thing is, though, and this is what's kind of ironic and annoying about this situation, is that Chris Blackwell is

kind of, has always been the opposite to most major corporate record labels. His style of business is more personal and not at all that kind of...So that's why the fact that it's Island is so kind of annoying and ironic.

D: Yeah, but you know I've heard this about Chris Blackwell too, but I think even a guy like that is still working under a lot of assumptions about cultural ownership and never even gave it a thought, perhaps like you haven't, that: Hey, this whole concept of the private ownership of culture– there's something *wrong* here. It's too big to ever really have it occur to you maybe, but it certainly has occurred to us since this has happened. And we're actually on something of a crusade to bring this issue out for public debate, and start talking about: Wait a minute, what are we doing here, and what are the deleterious effects on culture itself by having it all privately owned to this degree where no one can touch anything else? An example is folk music. Folk music is dead. It's impossible now because folk music used to be based on stealing lyrics and music from previous stuff and incorporating it into what you're doing, and a constant evolving of things based on other things.

E: Yeah.

D: You can't do that today because everything is privately owned. You can't use music lyrics that exist today because they're privately owned, and so the idea, the very essence of folk music *per se* is impossible now because of this situation.

E: It's a pretty big thing you're taking on there.

D: Yes.

E: There's a lot of money involved and I think it's pretty clear that in terms of the creative process, if you're sampling momentarily, if you're just borrowing you know, little sonic things from someone else's piece and you're creating something completely new, I mean it shouldn't really be a question of getting permission, but when you're talking about actual songs and ownership of copyrights and all that, I mean it's, you know, you're getting into a whole different area, and I don't think that that's going to change.

D: Well, I think ownership should extend to the entire work only. In other words, copyright and ownership of a song means that no one else can use that song, or cover that song, without paying the artist– because that's the artist's work, that's the artist's entire work– but, like you say, any fragmentary use, I would totally eliminate any concept of ownership. That's what I would do.

E: You know, we've actually suffered in the past ourselves with this where we got sued for Bono quoting someone else's lyrics in a live album of ours.

D: Really?

E: And, at the time, we were actually quite shocked that the law was so stringent about it, you know, a quotation of one phrase or two phrases was a very big deal and there was a big cash settlement or whatever, so we've been on the other side of this.

D: I know, it's just a natural artist's inclination I think, to just use stuff like that, and it *is* shocking when you find out that you can't even do that.

E: Yeah. We learned pretty quick though. Maybe I never questioned this kind of thing, is this right, I just said, "Well, this is the situation so we have to live with it."

D: *No!*

E: Whether you have a chance of actually changing it, I don't know.

M: Yeah, I don't think we actually have a real chance, but what we *are* trying to do, in our own very miniscule kind of way, is just get information out.

E: Well, one thing I would say is, really being fair, you guys at Mondo should talk to Island about it, because my understanding of the sequence of events and what happened is a bit cloudy because it all happened quite a while ago, but also I wasn't really kept informed very much, once every couple of months I would get the latest installment, whenever we got a letter from Negativland asking us to do something, and the benefit concert was I thought quite an insane idea...

M: That was actually our record label's idea, and we thought that was kind of a silly idea. By that time we weren't even working with the label anymore and we thought that our label was doing that mostly as kind of publicity stunt or something.

E: Uh huh.

D: It didn't really make any sense. We were also against the *Kill Bono* T-shirt.

E: Yeah, I like that, I want one, ha ha.

M: At the time it seemed to us it was SST reacting against U2, but we weren't being sued by *U2*, we were being sued by Island.

E: Yeah.

M: But at a certain point, not hearing anything directly from your band, we started thinking, well, where *do* you draw the line of responsibility here? And of course there's been a million unanswered questions, which you've answered a lot of. I've tried to call Eric Levine and he never returns my calls.

E: But again, the problem is it wasn't U2 that were being affected, it was Island.

D: I don't know whether you know this or not, but there has actually been a lot of press about this situation, the Negativland record and the lawsuit...

E: I know you've really taken a kicking and I'm really sorry about how it's all come out, Island Records *hasn't* been affected, but we have gotten *so much shit* in the media about all this, and it's *really annoying.*

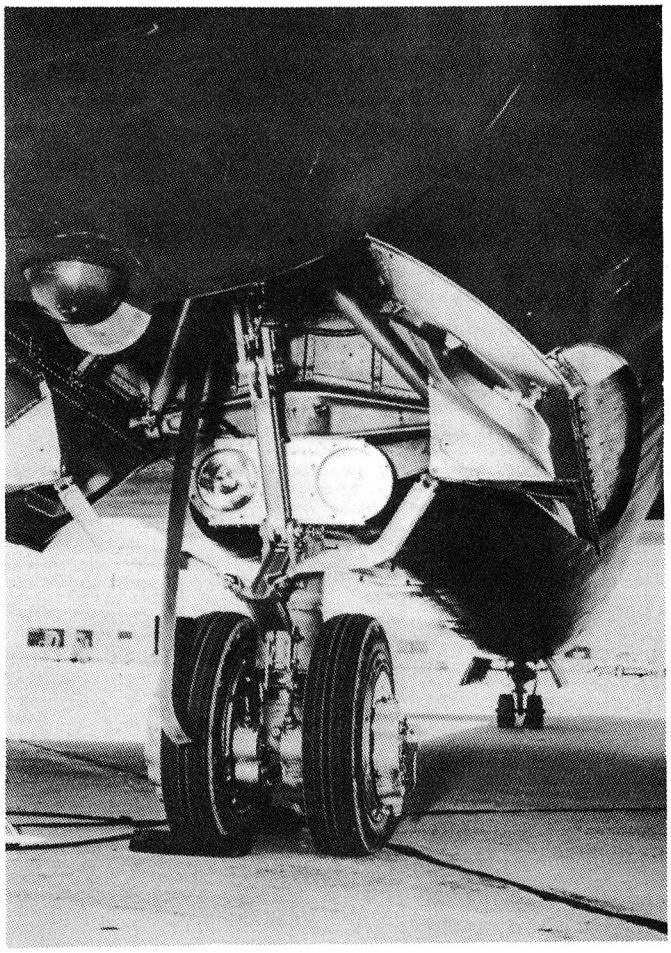
D: That's what I think, and that's why it was really, from your band's perspective, a totally wrong move that the label took.

E: Yeah.

D: And I'm wondering, well, in the future are you going to take more care about who your label sues in your behalf?

E: That's actually not accurate, they weren't suing you on our behalf. They were suing you on *their* behalf.

D: No, I'm saying the public perception is that they *are* suing us on your behalf.



M: The thing that was interesting was, we thought: why wasn't it *obvious* to somebody at Island Records that the amount of money they're going to make from us is *nothing*, and that in the end they're only going to– whether U2 is involved or not, it's going to, in the press it's going to end up reflecting badly on the band. And we thought that's so obvious that you'd think they would've just dropped it. But also it felt as if they thought we were so tiny and infinitesimal that no one would even care, we would just sort of drop off the face of the earth once it was over.

E: I don't know, quite, I mean you really have to ask them. I know that they probably reacted quickly and then, maybe on the matter of principle, felt like, "Well, we shouldn't be out of pocket for this. Of course damages may be inappropriate and we'll forget about that, but why should we be out of pocket?" And that's again the lawyers' thing. Once you press that button...

D: Well, I think they *should* be out of pocket because they

made a mistake and they should pay for it.

E: Ha ha ha. I'm sure they wouldn't see it like that...but again, I can't talk for them, really.

M: I wanted to ask you a question which I feel very strange doing, and we hadn't planned to ask you this at all, but: We used to put out our records ourselves on our own label. We did the whole do-it-yourself thing, and then we were working with this much larger independent label, SST, but we've decided now, looking at everything that's happened and weighing the various– what we think is going on in the world of music in general, we've decided to go back to our own record label and doing it ourselves.

E: Uh huh.

M: And what we're trying to do now is, we've been trying to find someone who will lend us money to get started, and we've been trying to borrow 15 or 20 thousand dollars. We've figured out on paper with the amount of records we could sell and the distribution we'll get, we could pay people back with 10% interest in about 9 months.

E: Right.

M: So I'm asking you if you'd be interested in lending us some money.

E: Ha ha ha, great! That's the first time I've *ever* been asked for *money* during the course of an interview. Ha ha ha.

M: Well, it's not a gift, it's a pure loan and we'll give you your 10%.

E: Yeah, I know, I know what you're saying.

D: And the publicity would be great.

E: Ha ha. I have to say, this is probably the most surreal interview I've ever had in my life.

All: Ha ha ha.

E: Well, listen, I feel sort of put on the spot but, yeah, I'm, I'm interested...

M: We're not trying to put you on the spot at all, and that's why I said I feel funny asking the question...

D: We feel funny doing everything. We're really desperate, that's all.

E: OK, well...Look, put something on a piece of paper and send it to– what's the best person to send it to...

M: Yes, please.

E: (Gives address)

M: Well, I'm amazed. We were afraid you would just hang up the phone.

E: Ha ha ha.

M: You've been in amazing good humor about it.

E: Well, it's been good to talk to you and sort of figure out where you're coming from– it's a little hard to tell from the record, quite what your intentions were.

M: Do you want to know what inspired the whole thing, though?

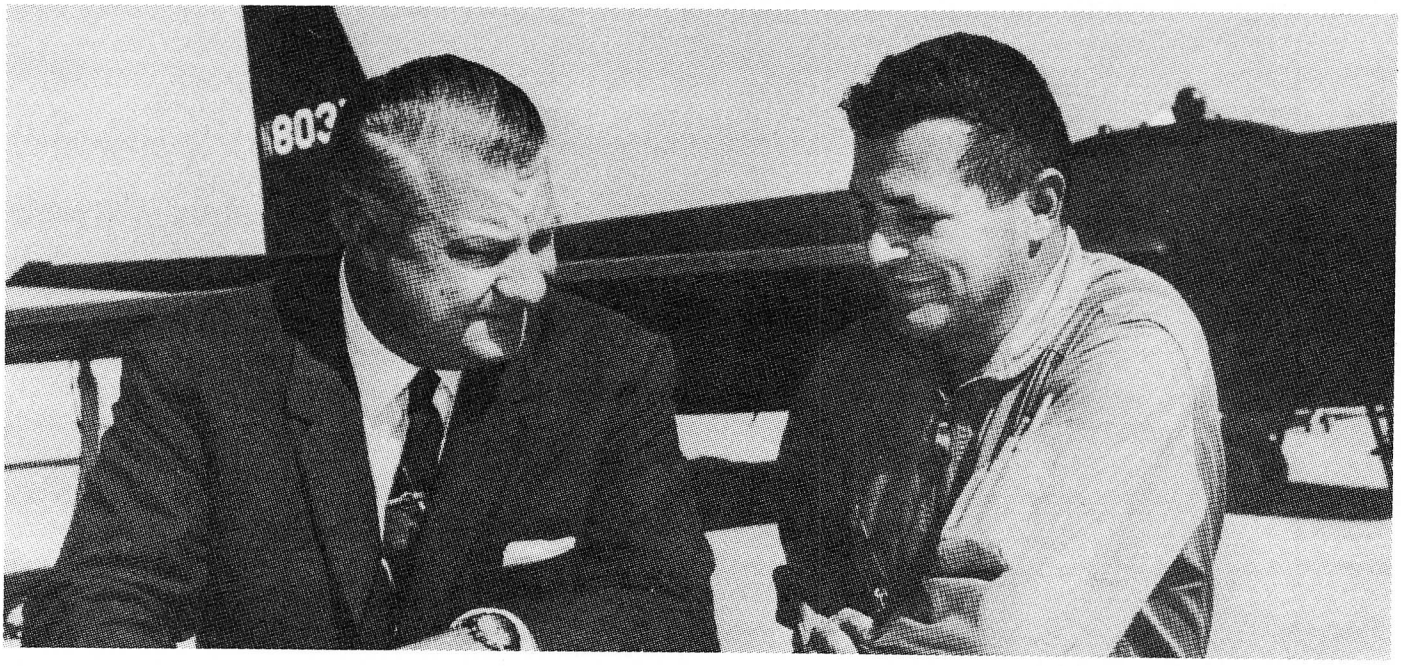
E: What?

M: It was getting the tape of Casey Kasem. We heard that tape and we thought, this is *so* amazing, we *cannot* be the only people to have this. We have to share this with the whole world. It's too great.

E: Ha ha ha.

M: And then he was talking about U2, so we said, "Let's use some music by U2," and the idea grew. That was sort of the seed of the idea and it just grew and grew. It was the Casey Kasem tape, and U2 wasn't the target.

E: Yeah, yeah. Well, it's been really good talking to you, and I'll think about that request.




ONE LOVE, ONE LIFE, ONE BLOOD
ONE
EVEN BETTER THAN
THE REAL THING
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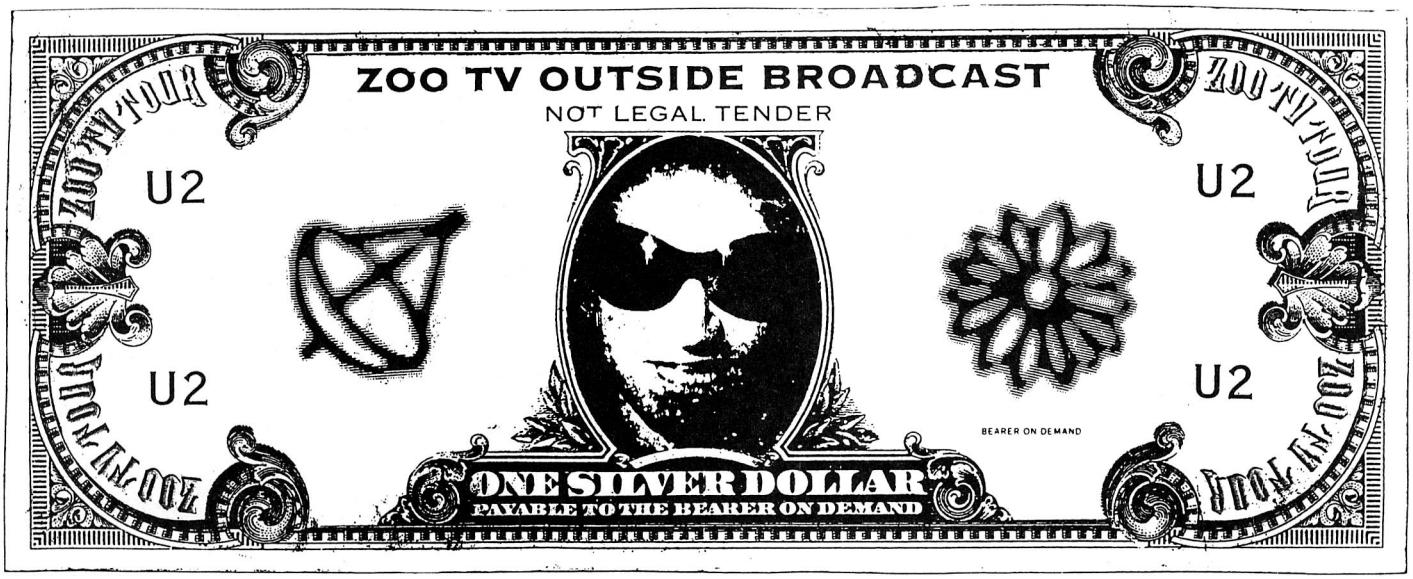
ONE DOLLAR


ZOO TV OUTSIDE BROADCAST
NOT LEGAL TENDER
U2
U2
U2
U2
BEARER ON DEMAND
ONE SILVER DOLLAR
PAYABLE TO THE BEARER ON DEMAND


ONE LOVE, ONE LIFE, ONE BLOOD
ONE
EVEN BETTER THAN
THE REAL THING
ONE
ONE
ONE
ONE DOLLAR

35. Yet Another Direct Appeal to Casey Kasem

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

July 31, 1992

Casey Kasem
c/o Westwood One Radio Network
9540 Washington Blvd
Culver City, Ca. 90232

Dear Mr. Kasem,

Greetings from Negativland once again. Although we have received no response to our last fax to you (dated July 4, 1992), we don't intend to give up on our rights as artists or on your ability to assist these rights.

We enclose an interview we recently did with "The Edge," (one of those guys from England) which will appear in the fall issue of *Mondo 2000* magazine (circulation 100,000). This is the latest event in our continuing efforts to expose the many interesting issues involved in the suppression of our record. Eventually, you may see that we are not casual pirates out to embarrass famous people, but pursue a serious and thoughtful dedication to found sound work. We are now concerning ourselves with the present structure of copyright law and the changes that are due in order to legalize what so much contemporary music and art has proven to be. The November issue of Keyboard magazine will contain a guest editorial by us about the need for reform in the copyright act. We are fighting for the right of artists, not marketers or businessmen, and not the subjects of unflattering work, to decide what art will consist of. We would love to have you as an ally in this effort to free up this country's present constraints on the re-use of culture.

We hope you will reconsider our request that you officially allow Island Records to return our record to us so that we can put it out ourselves on our own label. According to Island, you are the only one blocking this from happening. It took us a long time to change the mind of corporate Island, who began their anti-art litigation assuming our little record could be easily knocked out of the market and would soon be forgotten. However, we did not go away and we will not drop our campaign to get our work reinstated. Must it take as long for us to convince you that allowing this record out will now do less harm than not letting it out?

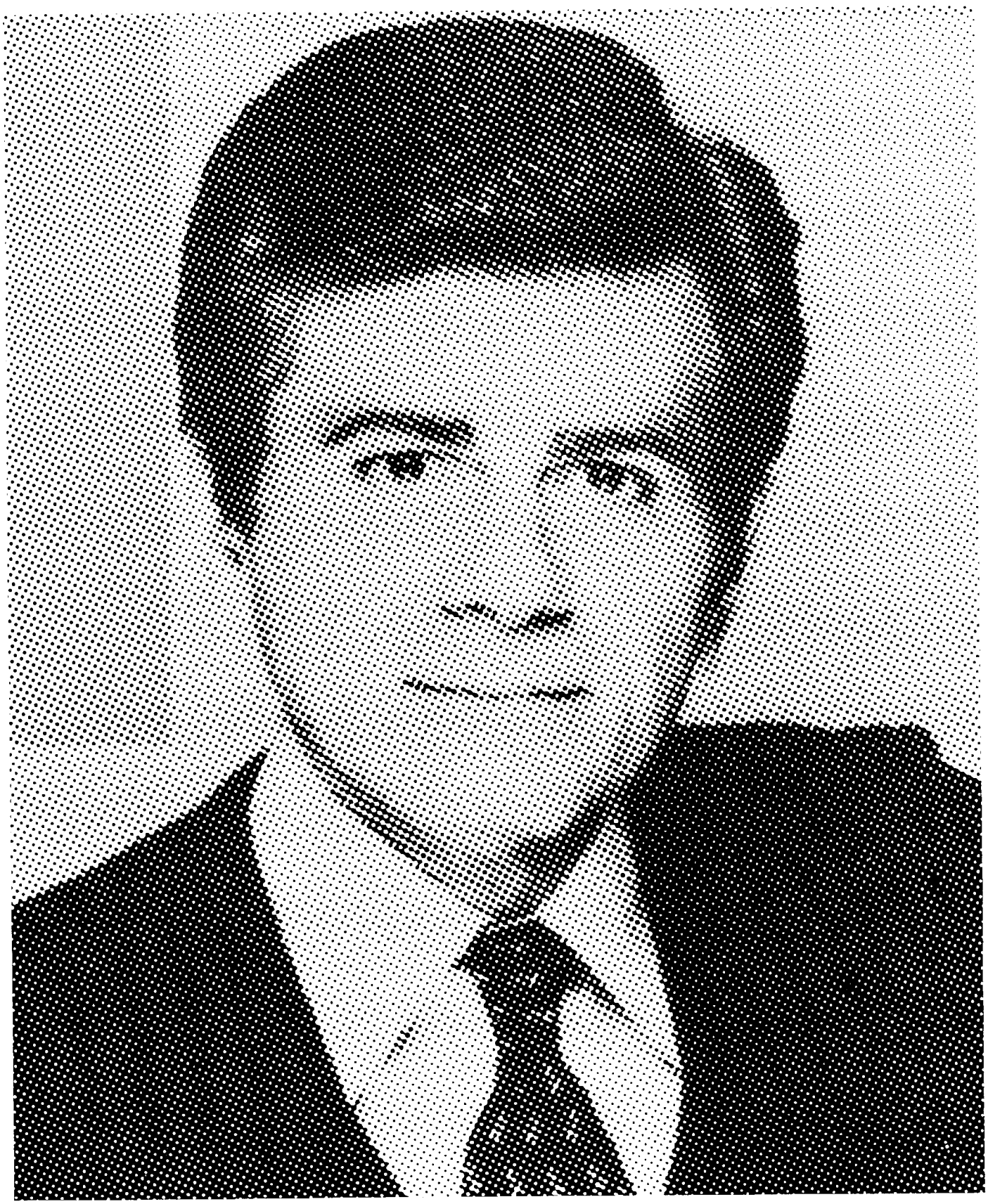
We suspect that the benefits of such an out-front stance on your part would far outweigh whatever face might be saved by continuing to side with the suppressors. Realistically, we don't think our record, if left alone in the first place, would have actually created many serious Casey Kasem detractors– it's too funny for that! However, if rereleased now with your approval, it might well do just the opposite– engender a lot of healthy respect for your ability to expose free speech (yours and ours) and the realities that free speech springs from (yours and ours).

We're not kidding! Please think about that old "part of the problem or part of the solution" stuff. The issues we pursue are large and you can make a difference. Thanks for your time, we await your response.

–Negativland

Encl.: "Negativland Interviews U2's The Edge for *Mondo 2000*"
Negativland Press Release of June 20, 1992
Transcript of your interview with radio stations KUNV and KAOS
Copy of Armbruster, Adler, Briskin & Glushon letter of April 29, 1992

1920 MONUMENT BOULEVARD ME-II CONCORD CA 94520 510-420-0469 FAX/VOICE



"Nobody should be censored."

36. One Way To Hear Negativland's *U2* Single

FOR IMMEDIATE RELEASE JUNE 1 1992

NEGATIVLAND "U2" ALBUM WILL NOT BE CENSORED!!!!

The Copyright Violation Squad, a division of the Aggressive School of Cultural Workers, Washington Chapter, is called into action once again as the satirical "U2" album by Negativland, loaded with strong social significance, is suppressed by the Entertainment-Military Esta[CENSORED]

It is obvious by now that [CENSORED] behind banning recordings such as this is not the money these artists are supposedly keeping the "owners" of the work from "legally earning." It is the suppression of a very well-guarded secret: NO ONE can own the Electronic Environment; one can only own the means by which to produce it. The music industry sure would like you to believe they do (money talks...), but really, pay no attention to the man behind the curtain. Works of art that have been praised the world over are now being banned from existence. Nobody has the right to abolish ideas, and recorded music is only organized thoughts and sounds.

Therefore the Copyright Violation Squad makes available a cassette copy of Negativland's "U2". To obtain your copy on high-quality tape, duplicated in real time from a digital master, send $7.00 IN CASH ONLY to: CVS [CENSORED] NW, Suite 2101, Olympia WA [CENSORED] ny surplus after costs will be anonymously donated to Negativland for their Legal Defense Fund.

This is only a temporary sol[CENSORED] perpetrators of these archaic notions of censorship must be convinced to reverse their decisions. The contacts can be found at right. Tell them they should stop letting their fantasies of control from getting in the way of true cultural expression.

AGGRESSIVE SCHOOL OF CULTURAL WORKERS

COPYRIGHT VIOLATION SQUAD

☛ Contact the people preventing the return of the "U2" album to Negativland--Make your opinion known!!!!

- Casey Kasem
[CENSORED] Drive, Los Angeles CA 90077
9380, fax 310 550 1585
- Island Records: [CENSORED] evine
14 E. 4th St., 3rd Floor, NYC NY 10012
212 477 8000, fax 212 475 8254
- **Warner Chappell Music: Don Biederman**
1290 6th Ave., 9th Floor, NYC NY 10015-2815
212 399 6910, fax 212 315 5590

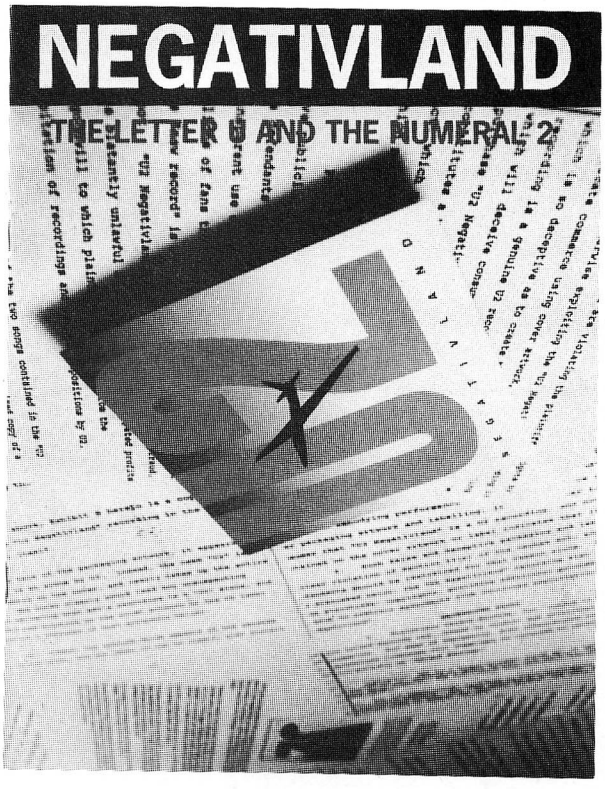
☛ To let the group U2 know what you think:
c/o Karen Kaplan, Principal Management
250 W 57th St #1502, NYC NY 10019 212 765 2330
[CENSORED] Paul McGuiness, Principal Management
Sir John Rogerson's Quay, Dublin 2 Ireland
333 1 777 330, fax 353 1 777 276

☛ For information on Negativland:
1920 Monument Blvd. MF-1
Concord CA 94520
fax 510 420 0469

As the first edition of **THE LETTER U AND THE NUMERAL 2** went to press on August 20, 1992, The Edge hadn't lent Negativland the money, Casey Kasem hadn't responded, and SST was still threatening to sue Negativland.

PART TWO

TO TALK LIKE THIS AND ACT LIKE THAT



In September of 1992 Negativland released pages 1-97 of this book and the "Crosley Bendix Discusses the U.S. Copyright Act" track from the enclosed disc as a magazine/CD package entitled **THE LETTER U AND THE NUMERAL 2.**

VOICE December 22, 1992

ROCKBEAT

Et U2, SST?

Negativland opened its Knitting Factory shows last month with facetious (or paranoid) shout-outs to Warner/Chappell Music publishing, Island Records, and **U2**. They should have added their former label SST Records to the list: the day after Thanksgiving, the California indie slapped the self-styled "pirate guardians of what's left of public consciousness" with an 80-page slab of high-rent legalese.

SST owner **Greg Ginn** (who failed to return several *Voice* calls) was supremely honked off about his company's portrayal in Negativland's *The Letter U and the Numeral 2*, a provocative one-shot magazine collection of journalism, press releases, legal documents, correspondence, and other absurdities pertaining to the legal and ethical muck raised after the band released "U2," a parody of "I Still Haven't Found What I'm Looking For" that used the song itself, salty **Casey Kasem** outtakes, and a boneheaded **Bono** interview to brutally hilarious effect. *The Letter U*'s accompanying CD contains a thoughtful meditation on the theory and practice of appropriation by "Crosley Bendix, director of stylistic premonitions for the Universal Media Netweb." Ginn responded by suing the band for a minimum of $90,000 "relief." Which somehow reminds us of our favorite Bendix one-liner: "The very idea of mass culture is now primarily propelled by economic gain and the rewards of ownership."

Ginn evidently saw red over the reproduction of SST press releases pertaining to the case, an indemnification agreement, and a hostile letter from the label's attorney—in essence he is suing the band for printing his threat to sue the band. He was also honked off by the graphic alteration of SST's "CORPORATE ROCK STILL SUCKS" bumpersticker into the pissier "CORPORATE SST STILL SUCKS ROCK"; not to mention the inclusion of a recent credit report—ordered pseudonymously by U-2 pilot "Gary Powers"—that placed SST's net worth at $1.2 million.

Ironically joining corporate rock in punishing Negativland for "copyright infringement" ("your best entertainment value," gloats *The Letter U*), Ginn wants Negativland to pay the entire $90,000 and change he claims it cost him to settle the "U2 Infringement Action." Meanwhile, according to Negativland's **Mark Hosler**, SST has been unilaterally withholding royalty payments from the band. The group has thus involuntarily paid off at least a third of its debt.

Hosler also says that only Casey Kasem's agreement is needed to put the "U2" CD back into circulation, though we wouldn't hold our breath. The group is still waiting for U2's **the Edge** to get back to them, too. In a telephone interview with the guitarist in the current issue of *Mondo 2000*, they gently ambush the unprepared Irishman, then hit him up for a $20,000 loan (a nonedited version is included in *The Letter U*). "That's the first time I've ever been asked for money during the course of an interview," confesses the Edge. "Ha ha ha."

Negativland encourages anyone needing more information about their righteous struggle to fax them at 510-420-0469.

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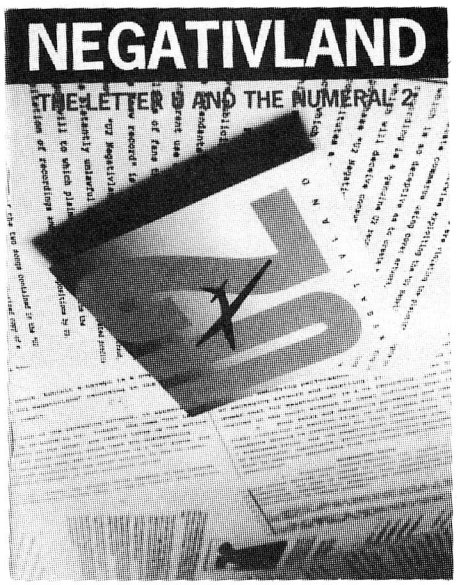
SPIN



Lawsuits, Baby

Big news for followers of the Negativland/U2 controversy: It's over, sort of. Island Records and Warner-Chappell Music, the corporate behemoths representing U2, ate former Negativland label SST Records for breakfast, collecting over $90,000 in damages and settlement fees. Now there's a new controversy—the Negs are being sued again, this time by SST, which claims the band broke its contract by refusing to pay the damages generated by the lawsuit, and for copyright infringement by publishing a magazine that used SST memos and bumper stickers to document the band's plight. Nonetheless, Negativland has released a new fan-funded CD, *Free*, and is planning a short tour of the West Coast. "It's as if we were finally emerging from the swamp," laments Negativland's Mark Hosler, "and the creature came up and grabbed us by the ankles."

MAY 1993

38. Negativland Receives Anonymous Fax

eat my fuck ☎ 415-567-4628 10/9/92 1:15 AM 1/1

Hey fuckers
your stupid book and all your whining add up to a big headache I dont need. And I wasted ten fucking bucks. who cares about this shit people are dying in cambodia. SST did a service by cutting your shit. you should have paid them. i still like your records but this whining is lame. Like Bono or whoever even cares in the "interview". I don't. All talk and no play make me a dull boy. be responsible for your actions: there is no better advice. Later homies

EVAN S. COHEN
S. MARTIN KELETI
COHEN AND LUCKENBACHER
740 North La Brea Avenue
Los Angeles, California 90038-3339

(213) 938-5000

Attorneys for Plaintiff GREGORY GINN d/b/a SST RECORDS

92 6592 DWW (JGx)

United States District Court
Central District of California

GREGORY GINN, an individual doing business as SST RECORDS,

Plaintiff,

v.

DON JOYCE, an individual; RICHARD LYONS, an individual; CHRIS GRIGG, an individual; MARK HOSLER, an individual; and DAVID WILLS, an individual,

Defendants.

Case No. CV-

COMPLAINT FOR

(1) COPYRIGHT INFRINGEMENT;

(2) NONCOMPLIANCE WITH FAIR CREDIT REPORTING ACT;

(3) BREACH OF WRITTEN CONTRACT;

(4) SPECIFIC PERFORMANCE OF BREACHED ORAL CONTRACT; and

(5) DECLARATORY RELIEF

JURY TRIAL DEMANDED

Plaintiff GREGORY GINN alleges:

I

JURISDICTION

1. This court has subject matter jurisdiction over this action because it arises under an Act of Congress relating to copyrights, more particularly, the Copyright Act of

1976, as amended, Title 17, United States Code), pursuant to 28 U.S.C. § 1338(a) and 28 U.S.C. §§ 2201-2202. This court also has subject matter over this action the Fair Credit Reporting Act, Subchapter III, Chapter 41, Title 15, United States Code, pursuant to 15 U.S.C. § 1681p. With regard to any claim stated below which is not brought under either the Copyright Act, or the Fair Credit Reporting Act, the court has jurisdiction over such other claim under the doctrine of supplemental jurisdiction, pursuant to 28 U.S.C. § 1367.

II

PARTIES

2. Plaintiff GREGORY GINN is, and at all relevant times was, an individual doing business as SST RECORDS ("SST"), and has his principal place of business in Los Alamitos, California, within the Central District of California. Since in or about 1979, in Los Angeles County, California, SST has been in the business of recording sound recordings of musical groups and other creative individuals, and manufacturing and distributing phonorecords of those sound recordings to the public.

3. Defendant DON JOYCE ("Joyce") is an individual domiciled in the State of California.

4. Defendant RICHARD LYONS ("Lyons") is an individual domiciled in the State of California.

5. Defendant CHRIS GRIGG ("Grigg") is an individual domiciled in the State of California.

6. Defendant MARK HOSLER ("Hosler") is an individual domiciled in the State of Washington.

7. Defendant DAVID WILLS ("Wills") is an individual domiciled in the State of California.

8. Plaintiff is informed and believes, and on such information and belief alleges, that at all relevant times, defendants Joyce, Lyons, Grigg, Hosler, and Wills have

engaged in business as partners in a musical group known as "Negativland," and each of them, in doing all of the things alleged below, has acted as the agent and representative of the others.

III

VENUE

9. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b), in that a substantial part of the events or omissions giving rise to the claims occurred in this district.

10. Venue also is proper in this district pursuant to 28 U.S.C. § 1400(a), in that a defendant or his agent resides or may be found in this district.

IV

FIRST CLAIM FOR RELIEF

(COPYRIGHT INFRINGEMENT)

(Against All Defendants)

11. SST realleges, and incorporates by reference, the allegations of paragraphs 1 through 10, inclusive, as though fully set forth below.

12. On or about December 20, 1991, SST authored a literary work in the form of a news release (the "First Release"), a copy of which is attached as Exhibit A and incorporated by reference. On or about October 20, 1991, SST authored a literary work in the form of an indemnification agreement between SST and defendants (the "Indemnification Agreement"), a copy of which is attached as Exhibit B and incorporated by reference. On or about February 3, 1992, SST authored a literary work in the form of a news release (the "Second Release"), a copy of which is attached as Exhibit C and incorporated by reference. On or about September 26, 1990, SST authored a literary work in the form of a bumper sticker (the "Bumper Sticker"), a copy of which is attached as Exhibit D and incorporated by reference. On or about February 26, 1992, SST's

attorneys wrote a letter to defendants Joyce, Lyons, and Grigg ("Attorney Letter), a copy of which is attached as Exhibit E and incorporated by reference.

13. The First Release, Indemnification Agreement, Second Release, and Bumper Sticker contain material wholly original with plaintiff and is copyrightable subject matter under the laws of the United States. The Attorney Letter contains material wholly original with its author and is copyrightable subject matter under the laws of the United States.

14. On or about October 26, 1992, SST complied in all respects with the Copyright Act of 1976 and all other laws governing copyright, and secured the exclusive rights and privileges in and to the copyrights of the First Release, Indemnification Agreement, Second Release, Bumper Sticker, and Attorney Letter (collectively, the "Copyrighted Material"). SST secured the exclusive rights and privileges in and to the copyright of the Attorney Letter from its author.

15. At all relevant times, SST has been, and still is, the owner of all rights in and to the Copyrighted Material under the applicable statutes and common laws of the United States.

16. On or about September, 1992, defendants infringed the copyrights on the Copyrighted Material by publishing (or causing the publication of) the Copyrighted Material in a collective work consisting of literary works, pictorial or graphic works, and sound recordings together entitled *The Letter U and the Numeral 2*; this publication took took the form of packages which each containing a copy of the literary, pictorial and graphic components of the work, as well as a phonorecord containing the sound recording components of the work (collectively, the "Magazine Package"). Defendants knowingly and willfully copied the Copyrighted Materials in nearly their entirety for inclusion in the copies included in the Magazine Packages. Plaintiff did not authorize such publication. This unauthorized publication of the Copyrighted Materials took place in Los Angeles County.

17. As a proximate result of the infringement alleged above, SST has been

damaged, in an amount to be proven at trial.

V

SECOND CLAIM FOR RELIEF

(NONCOMPLIANCE WITH FAIR CREDIT REPORTING ACT)

(Against All Defendants)

18. SST realleges, and incorporates by reference, the allegations of paragraphs 1 through 10, inclusive, as though fully set forth below.

19. Dun and Bradstreet, Inc. ("D & B"), is a corporation which, for monetary fees, regularly engages in whole or in part the practice of assembling or evaluating credit information and other information on individuals for the purpose of furnishing reports on those individuals to third parties, and uses means and facilities of interstate commerce for the purpose of preparing or furnishing such reports. D & B assembled a such a report or evaluated such information concerning plaintiff, who is an individual; the report or information bears on plaintiff's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, and is used or or expected to be used a a factor in establishing plaintiff's eligibility for credit or insurance to be used for plaintiff's personal, family, or household purposes, among others (the "Report").

20. In or about April, 1992 one or more defendants knowingly and willfully obtained the Report under false pretenses, using the pseudonym Gary Powers, or, using an individual named Gary Powers to carry out their scheme to obtain the Report under false pretenses, in violation of 15 U.S.C. § 1681q.

21. Defendants also caused publication and wide dissemination of the Report by reprinting it in the Magazine Packages, in further violation of the Fair Credit Reporting Act; these acts fell outside the scope of the permissible purposes for obtaining consumer credit reports and violated plaintiff's privacy.

22. As the direct and proximate consequence of these failures to comply with

the Fair Credit Reporting Act, plaintiff has been damaged in an amount to be proven at trial.

VI

THIRD CLAIM FOR RELIEF

(BREACH OF WRITTEN CONTRACT)

(Against All Defendants Except Wills)

23. SST realleges, and incorporates by reference, the allegations of paragraphs 1 through 10, inclusive, as though fully set forth below.

24. On or about September 10, 1990, SST and defendants Joyce, Grigg, Lyons, and Hosler entered into a written agreement (the "Record Contract"). A copy of the Record Contract is attached as Exhibit F and incorporated by reference.

25. Plaintiff has performed all conditions, covenants, and promises required by SST on SST's part to be performed in accordance with the terms and conditions of the Record Contract.

26. On or about September 3, 1991, ISLAND RECORDS LTD., a United Kingdom corporation, ISLAND RECORDS, INC., a New York corporation, WARNER CHAPPELL MUSIC INTERNATIONAL LTD., a United Kingdom corporation, and WARNER/CHAPPELL MUSIC, INC., a California corporation, sued SST, and defendants Grigg, Hosler, Joyce, and Wills, among others, for copyright infringement arising out of sound recordings defendants had delivered to SST (the "U2 Infringement Action"). The U2 Infringement Action was brought in this court and bore the case number CV-91 4735 AAH (GHKx).

27. The parties who brought the U2 Infringement Action eventually dismissed it. In the meantime, SST expended approximately $90,624.33 in defending and settling the U2 Infringement Action.

28. As part of the Record Contract (¶ 10), defendants Joyce, Grigg, Lyons, and Hosler "agree[d] to indemnify, save and hold SST Records harmless from any and all

loss and damage (including attorney's fee) arising out of or connected with any claim by a third party which is inconsistent with any of the warranties or agreements made by [defendants] in [the Recording Agreement]."

29. Defendants Joyce, Grigg, Lyons, and Hosler breached the Recording Agreement by failing to indemnify SST after SST demanded payment for the approximately $90,624.33 expended in defending and settling the U2 Infringement Action.

30. As a proximate result of defendants' breach of their contractual duties, and the facts alleged above, SST has been damaged in an amount to be proven at trial, but in no event any less than $90,000.00.

VII

FOURTH CLAIM FOR RELIEF

(SPECIFIC PERFORMANCE OF BREACHED ORAL CONTRACT)

(Against All Defendants)

31. Plaintiff realleges, and incorporates by reference, the allegations of paragraphs 1 through 10, inclusive, as though fully set forth below.

32. Sometime in or about early October, 1991, SST and defendants entered into an oral agreement (the "Oral Agreement") substantially similar to the written agreements attached as Exhibits G and H, which are incorporated by reference, in which those defendants agreed to deliver to SST master recordings embodying the sound recordings of certain performances of musical works by defendants (the "Sound Recordings"). The Sound Recordings included defendants' next "cassette only" recording and a "double live LP" recording. SST paid defendants the agreed-upon advance of $4,500.00 by tendering a written negotiable instrument to defendant Grigg, who endorsed it, and such a writing constitutes a note or memorandum of the transfer of the copyrights in and to the Sound Recordings.

33. Plaintiff has performed all conditions, covenants, and promises required by

SST on SST's part to be performed in accordance with the terms and conditions of the Oral Agreement.

34. SST is informed and believes, and on such information and belief alleges, that defendants completed the fixation of the Sound Recordings onto master tapes (the "Phonorecords").

35. Defendants have breached the Oral Agreement by failing to deliver to SST the Phonorecords.

36. Plaintiff has no adequate remedy at law for the breach of oral contract alleged above, because the Phonorecords are unique goods and the damages for defendants' failure to delivery the Phonorecords to plaintiff are impossible to calculate.

VIII

FIFTH CLAIM FOR RELIEF

(DECLARATORY RELEIF)

(Against All Defendants)

37. SST realleges, and incorporates by reference, the allegations of paragraphs 1 through 10, inclusive, and paragraphs 32 through 36, inclusive, as though fully set forth below.

38. There exists a real controversy between SST and defendants as to the true ownership of the Sound Recordings, and this controversy is dependent on an interpretation of the § 201(a) of the Copyright Act of 1976, and the decisional law interpreting that statute.

39. By this action, SST prays that SST be adjudicated either an owner or exclusive licencee in the copyrights in and to the Sound Recordings on the Phonorecords.

WHEREFORE, SST prays judgment as follows:

1. On the First Claim for Relief, for damages according to proof;

2. On the Second Claim for Relief, for damages according to proof, and for punitive damages as the court may allow;

3. On the Third Claim for Relief, for damages according to proof, but in no event less than $90,000.00;

4. On the Fourth Claim for Relief, for specific performance (*i.e.*, delivery to SST of the Phonorecords);

5. On the Fifth Claim for Relief, for a judicial declaration that SST is the owner or exclusive licensee of copyrights in and to the Sound Recordings;

6. For attorney's fees pursuant to 15 U.S.C. § 1681n or 15 U.S.C. § 1681*o*, and pursuant to the terms of the Record Contract;

7. For costs of suit incurred in this action; and

8. For such other and further relief as the court should deem just and proper.

Dated: November 9, 1992

COHEN AND LUCKENBACHER

By: _____
EVAN S. COHEN

40. Negativland's Sixth Press Release

FOR IMMEDIATE RELEASE

DATELINE: HOWLAND ISLAND, DECEMBER 7, 1992

"The singing summons arrived at Netweb Headquarters in California yesterday. Mr. Omer Edge, Chief of Autoschematics, was summoned to the security cubicle. The very friendly process server handed Omer the lawsuit from SST, while singing an original lyric called *Santa Claus Has Gone Away,* using the melody from *Santa Claus Is Coming To Town.* Omer says he wished he had a tape recorder, then he wondered if it was a copyright infringement, then he returned to his office to read the charges, then he SatFaxed it all to you. He assures me no lawyer has laid eyes on it."

C. Elliot Friday massages the missing fingers beneath the glove on his left hand, as he nods to dismiss his Howland Chief of Netweb Operations. Then he scribbles a few notes about the case, one of which reads like this:

> *Look for precedents for context being the determining factor for the validity of reprinting public documents. The Judge and jury should be asked to read the whole magazine.*

Then he punches up Personnel. "Transmit these notes." he says. "Oh, Mr. Friday," Personnel says, "What's happening? It's so hot down here..." Mr. Friday loosens his bowtie in sympathy. "I know, Penny. Remember, we're under a lot of pressure here– maybe 30,000 pounds per square inch– but the dome can take it. My last announcement is due again in ten minutes: The Weatherman says we've got a 92% chance of getting enough solar-positive days during this part of the year to provide the necessary energy for several months of life support. Caracas will be here in the *Caracas* in a few hours. He can fix the lift hydraulics. Meanwhile, we are maintaining full contact with the hemispheres...Which reminds me, Mr. Lyons and The Weatherman are both named in SST's lawsuit. I need to get a message to them."

Personnel bleeps herself into the background as she displays her directory selections. Friday slowly juggles a couple of snowstorming paperweights. Eventually, Personnel reappears in a little box up in the corner to say, "Sorry, Mr. Friday, I can't locate either one. Are they homeless?" Friday wonders, then responds. "Send this to that Post Office box Negativland has. They'll get it.

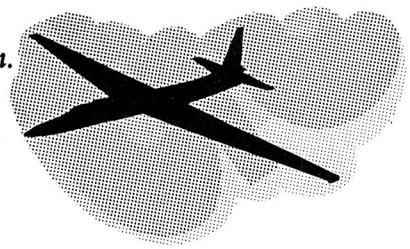
> *"Rehearsals paid off. We're going to court. Return to Howland ASAP. Island should be fixed in a week. Don't worry, SST is playing right into our scheme for conceptual advancement.*
> "Sign it: *–C. Elliot Friday."*

"Yes, Sir." says Penny as Friday turns her off. The big yellow RESPONSE REQUESTED light from Netweb Mainland begins to flash, so Friday shuts off the whole console. He begins to frame frames.

Helicam descends over L.A.'s meager, if not average skyline/Zooms down toward a short office tower on North LaBrea/Zooms through a window in the top floor/Rolling in to rest on the pacing mouth of Evan Cohen as it speaks into a portable mouthpiece. "No, no," says Evan Cohen's mouth. "That would be crazy, Greg..."

"No, no," interrupts Friday, "We used that universal-to-the-personal, zoom-in opening gimmick in their video." His mind movie pauses as he gazes out the picture porthole to see what appears to be the murky silhouette of an approaching submarine, plowing its way out of the monumental underwater cloud bank of silt being kicked up from the ocean floor by Howland's emergency reserve hydro turbine exhaust ports.

Sergio Caracas peers through his monocle into his submarine's infrared periscreen while spitting responses into a headset. "That's it!...That's Howland, docking soon..." His thick, middle-European accent makes his English hard to understand. "What? No, I said: My advice, if you want it, is to lodge no countersuits at all. Make them prove exactly what they charge– and make it public. You said the only way to get at copyright reform is not through Congress, but through the courts. This is your chance to try it! I agree with Friday. Have the judge and jury read the magazine– a magazine about a prior lawsuit, also about copyright infringement. It's a case within a case. There's circular referencing galore. It's a 10-year piece. Just don't panic. There's a creative potential in every move. Got to go." Caracas flips off the CelSat transmision to somewhere in the Northwestern U.S. as he plunges the **ALL STOP** lever full forward. Then he adds to his notes.



Appear in court as Gary Powers or Dick Vaughn or some other dead person.

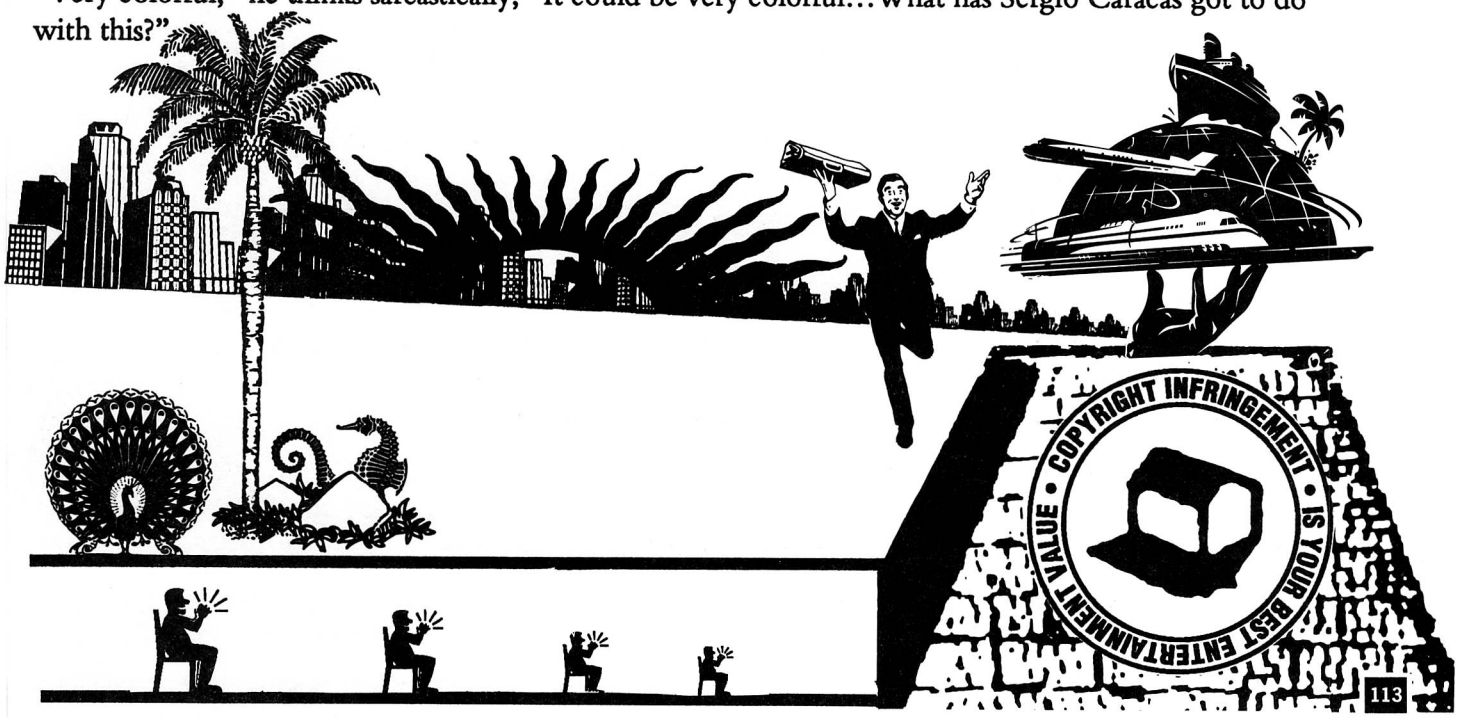
Don't play the game by their rules.

Defend without attacking.

The issue of art vs. ownership

The vintage, fully restored and upgraded, diesel-powered German U-Boat *Caracas* drifts to a silent stop above one of Howand's dome-top docking ports. The arm raises.

On the top floor of a short office tower on North LaBrea, Evan Cohen stares into the pattern on the drapes that block the light from reaching him. The pattern is hundreds of little Suns rising, or maybe they're Suns setting, each one an exact duplicate, all rising or setting beyond a splash of ocean horizon. "Very colorful," he thinks sarcastically, "It could be very colorful...What has Sergio Caracas got to do with this?"



41. Negativland Finds Free Legal Help

MORRISON & FOERSTER
ATTORNEYS AT LAW

LOS ANGELES
SACRAMENTO
ORANGE COUNTY
PALO ALTO
WALNUT CREEK
SEATTLE

345 CALIFORNIA STREET
SAN FRANCISCO, CA 94104-2675
TELEPHONE (415) 677-7000
TELEFACSIMILE (415) 677-7522
TELEX 34-0154 MRSN FOERS SFO

NEW YORK
WASHINGTON, D.C.
DENVER
LONDON
BRUSSELS
HONG KONG
TOKYO

DIRECT DIAL NUMBER
(415) 677-7018

December 22, 1992

Negativland

Oakland, California 94618

Re: Engagement to Perform Legal Services

Dear Negativland:

This is to set forth the basic terms upon which you have engaged our firm to perform certain legal services.

1. Scope of Engagement. In general, we will defend you in the suit brought against you by Gregory Ginn, an individual doing business as SST Records.

2. Services Pro Bono Publico. We will perform the services on this matter without charge to you for our time and without compensation in the form of a contingent fee interest in any compensatory or punitive damages. We are currently considering whether to bring any claims on your behalf in this action. Should we decide to bring a claim seeking compensatory or punitive damages, we will discuss with you at that time a possible modification of this engagement letter to provide for a contingency fee.

If, apart from compensatory or punitive damages, an award of attorneys' fees is obtained from any other party based on our work on this matter, the attorneys' fee award shall be the property of our firm. However, it is the policy of our firm to donate such an attorneys' fee award to a nonprofit corporation having the principal purpose of funding the costs of pro bono legal work.

Subject, of course, to our ethical and professional obligations, you agree that the firm may control its staffing and the expenditure of its time and resources on this matter, and may terminate its legal services and withdraw from this engagement in the event that you instruct the firm to undertake a course of conduct contrary to our professional advice to you.

3. Costs and Disbursements. We will advance costs and disbursements subject to your agreement that you will reimburse us for these costs and disbursements. We will bill you periodically for reimbursement.

4. General Responsibilities of Attorney and Client. We will keep you apprised of developments as necessary to perform our services and will consult with you as necessary to ensure the timely, effective and efficient completion of our work.

5. Waiver of Future Conflict. You have asked us to represent you only in connection with the suit against you by Gregory Ginn, an individual doing business as SST Records, and you understand that we are free to represent other clients or take positions adverse to you in matters which are not substantially related to matters for which you have retained us.

We understand that you will provide us with such factual information and documents as we require to perform the services, will make any client decisions and determinations as are appropriate to facilitate the completion of our services.

Should you ever wish to discuss any matter relating to our legal representation, please do not hesitate to call me directly, or to speak to one of our other attorneys who is familiar with the engagement.

Very truly yours,

Adam C. Belsky

Harlan M. Mandel

42. Casey Kasem's Form-Letter Response to Irate Negativland Fans

Casey Kasem

January 8, 1993

Elizabeth Wilding-White

Chicago, IL 60647

Dear Elizabeth:

The issue over Negativland U2 isn't censorship. It's about theft and piracy. Negativland didn't own the written/recorded material it put on the record--and that's against the law.

Among other things, the Irish band U2's copyrighted material was "sampled" electronically and used without permission from its label, Island Records, and the publisher, Warner/Chappell. The result was then marketed openly for Negativland's own gain, without any copyright use fee being paid to Island Records or Warner/Chappell. You can't do that under the federal copyright law that protects artists and their original written/recorded material.

As for my part, I've never allowed the occasional cussing that comes with normal frustration during work hours to end up on my nationally--and even internationally--marketed shows. I'm as human as anyone else, but it's not my policy to use such language in the finished product. And, yes, I have it written into my contract as an added safeguard.

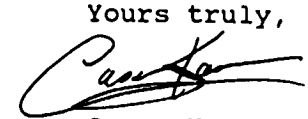
Apparently, some engineer, years ago, took some of my outtakes and distributed them--without my permission. Negativland used them--again without my permission. I have a sense of humor like anyone else. This parody's results are often funny. But the point is: the material was used illegally.

Negativland never went through legal channels and never got permission from Island Records, Warner/Chappell, U2, me or anyone else. It just took what it wanted and tried to market the result for its own gain. Under the court's permanent injunction, the Negativland record was pulled out of circulation and the band's label, SST Records, was ordered to pay certain sums--in turn, suing the band to recover its losses. The permanent injunction currently remains in effect. That's why it's still illegal for the band to try profiteering from the same material, just to pay its debts and penalties. That means they face contempt-of-court charges and other penalties if they do it again.

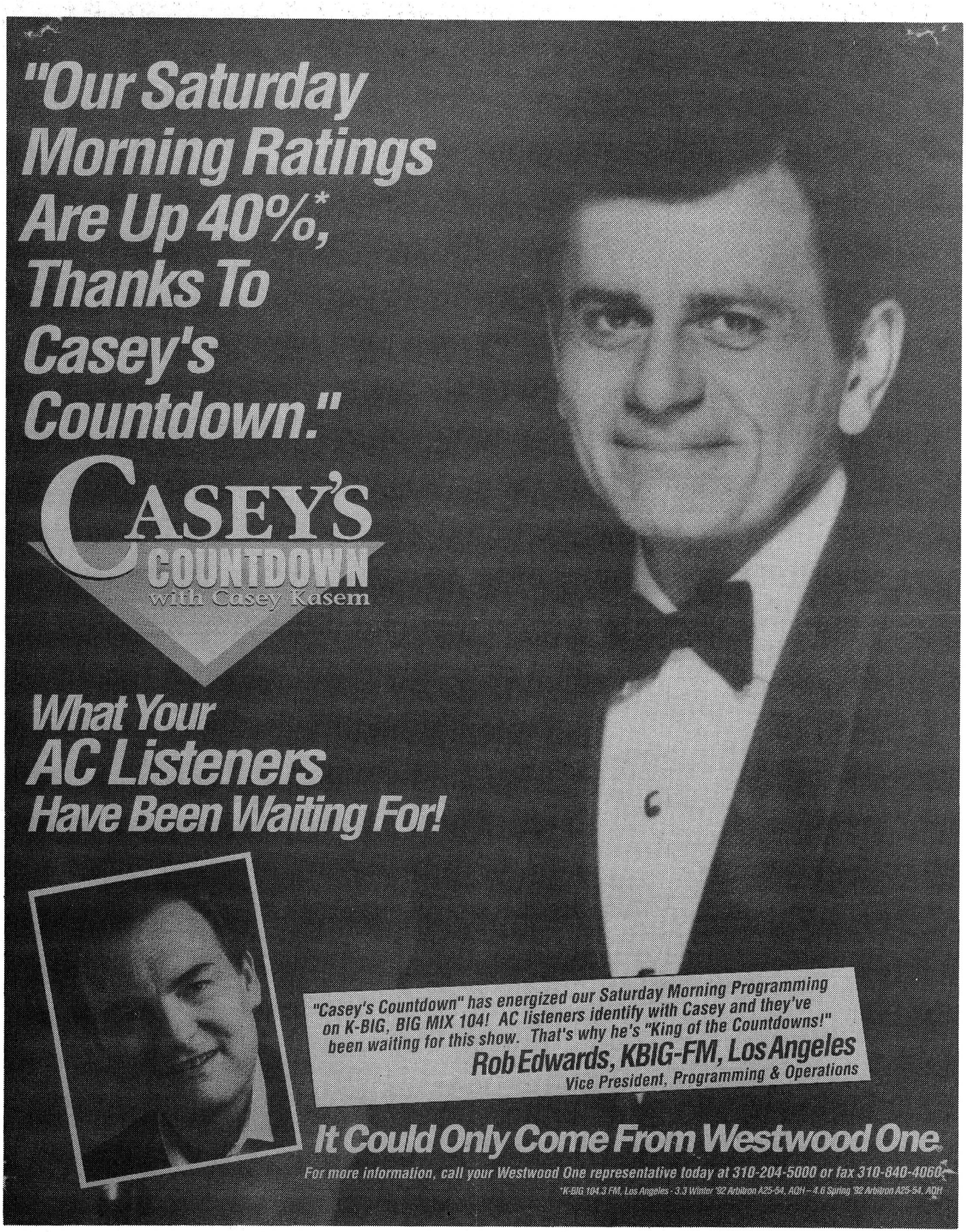
I'm all for free speech. But the First Amendment is no excuse for theft and copyright violation. It's not a shield for greed, arrogance and disregard for other people's rights. I hope the band does get itself out of its current plight--but legally. And I hope fans such as yourself will continue to support groups you admire--without defending the wrong cause by mistake.

Free speech--and theft for private gain--aren't synonymous --nor should they be. Thanks for airing your concern.

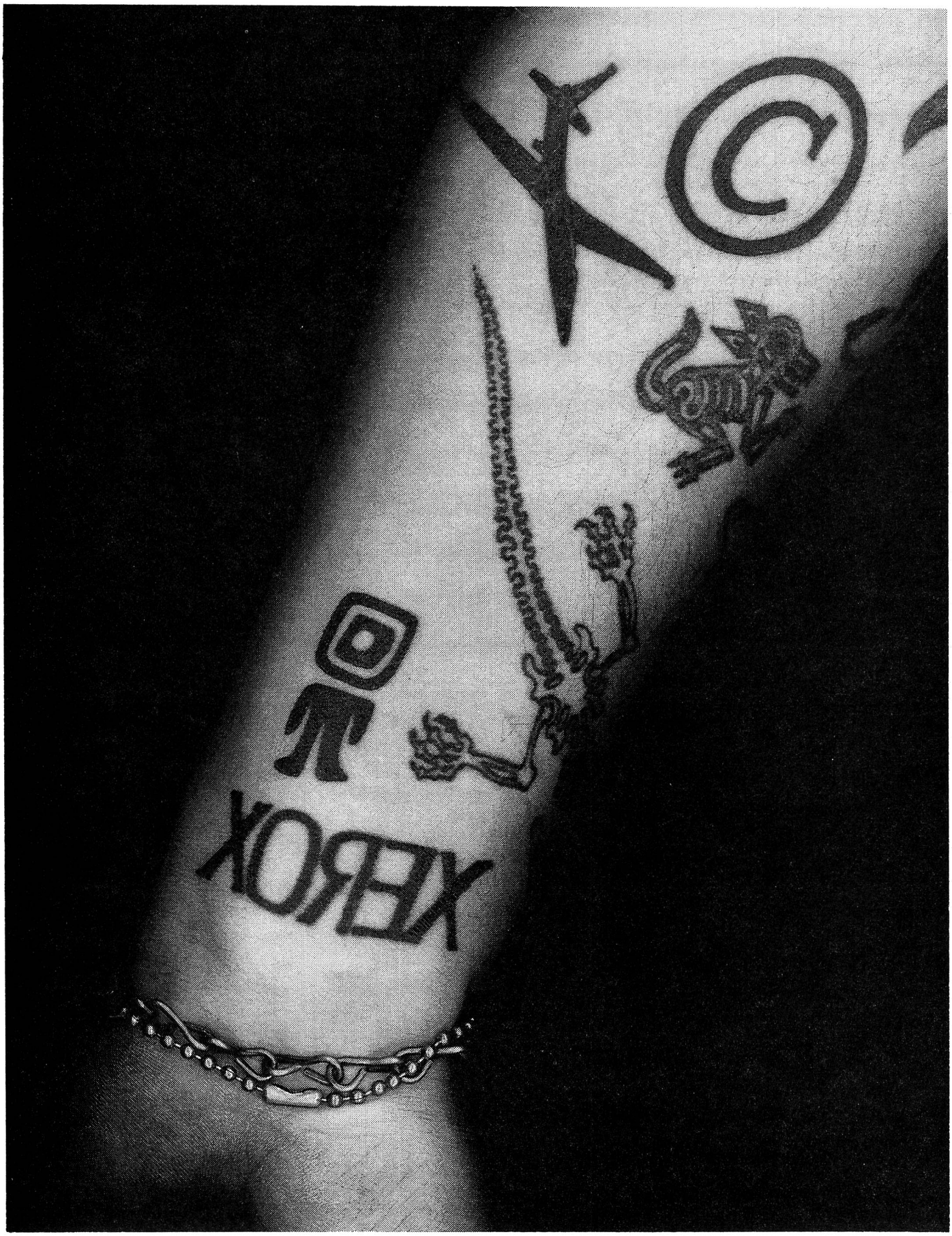
Yours truly,

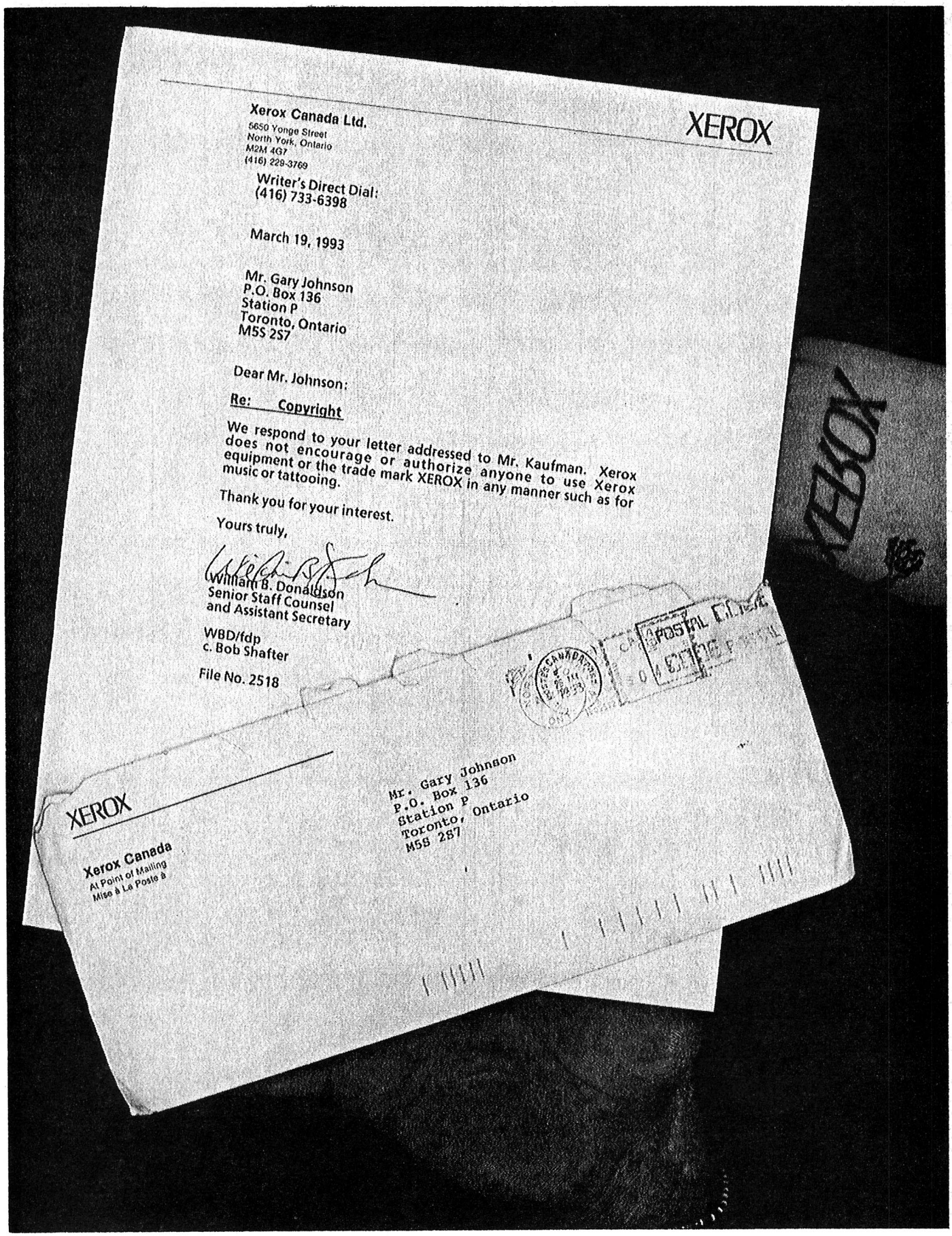


Casey Kasem


"Our Saturday Morning Ratings Are Up 40%*, Thanks To Casey's Countdown."
CASEY'S COUNTDOWN with Casey Kasem
What Your AC Listeners Have Been Waiting For!
"Casey's Countdown" has energized our Saturday Morning Programming on K-BIG, BIG MIX 104! AC listeners identify with Casey and they've been waiting for this show. That's why he's "King of the Countdowns!"
Rob Edwards, KBIG-FM, Los Angeles
Vice President, Programming & Operations
It Could Only Come From Westwood One
For more information, call your Westwood One representative today at 310-204-5000 or fax 310-840-4060
*K-BIG 104.3 FM, Los Angeles - 3.3 Winter '92 Arbitron A25-54, AQH – 4.6 Spring '92 Arbitron A25-54, AQH

43. U-2 Tattoo




Xerox Canada Ltd.
5650 Yonge Street
North York, Ontario
M2M 4G7
(416) 229-3769
XEROX
Writer's Direct Dial:
(416) 733-6398
March 19, 1993
Mr. Gary Johnson
P.O. Box 136
Station P
Toronto, Ontario
M5S 2S7
Dear Mr. Johnson:
Re: Copyright
We respond to your letter addressed to Mr. Kaufman. Xerox does not encourage or authorize anyone to use Xerox equipment or the trade mark XEROX in any manner such as for music or tattooing.
Thank you for your interest.
Yours truly,
William B. Donaldson
Senior Staff Counsel
and Assistant Secretary
WBD/fdp
c. Bob Shafter
File No. 2518
XEROX
Xerox Canada
At Point of Mailing
Mise à La Poste à
Mr. Gary Johnson
P.O. Box 136
Station P
Toronto, Ontario
M5S 2S7
XEROX

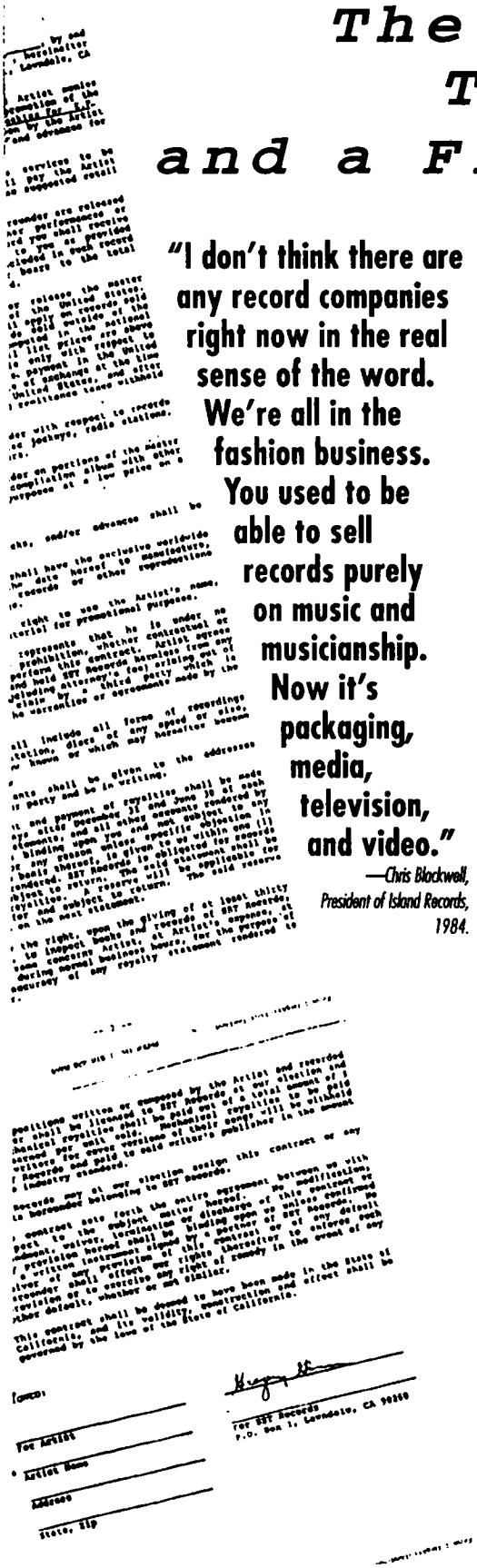
44. *Creem Magazine* Article, April 1993

The Letter U The Numeral 2 and a Fistful of Lawsuits

by Tony Fletcher

"I don't think there are any record companies right now in the real sense of the word. We're all in the fashion business. You used to be able to sell records purely on music and musicianship. Now it's packaging, media, television, and video."

—Chris Blackwell, President of Island Records, 1984.



Negativland is a band, in the loosest sense of the word, that knows full well the truth of Blackwell's statement. Setting themselves outside of the music business, the band members make records that poke fun at making records; they used the media to attack the media. They "claim the right to create with mirrors."

U2 is a band too, in the more formal sense of the word. Working within the music business, it has become the most successful rock group in the world, all the while trying to maintain a grassroots approachability. Recently, it brought the mass-market communications of satellite TV, telephones, and video into its live show.

SST is a California record label, with the motto "Corporate Rock Sucks," founded by ex-Black Flag members Greg Ginn and Chuck Dukowski. Owned nowadays by Ginn, it has thrived on releasing uncompromising records by cult bands such as Sonic Youth, Husker Du, Meat Puppets, and Negativland.

Island Records is a company poised between its past as an independent label that made it big—breaking Bob Marley and U2 in the process—and its present as one more subsidiary of the Polygram empire. It was founded by Chris Blackwell, who remains President despite selling the company to Polygram for many millions of dollars a few years ago.

And **Casey Kasem** is a radio announcer whose *American Top 40* show has made him a household name. Now, through a couple of slips of the tongue, he has become embroiled in a fascinating story involving all of the above parties.

It is a story that began in good humor but has no happy ending. Its plot takes in the volatile concept of ownership in the public domain, and it features a series of characters who publicly stand for independence and artistic freedom, but privately take legal action if things don't go their way.

It's a story rich in irony and poor in cheer. And it's a sad indictment of the litigious society we live in.

"Negativland occupies itself with recontextualizing captured fragments to create something entirely new—a psychological impact based on a new juxtaposition of diverse elements, ripped from their usual context, chewed up, and spit out as a new form of hearing the world around us."

—Negativland, press release, November 1991.

Despite a history of appropriating other people's sounds, when the Bay-area based Negativland made the record *U2* in 1991, they should have known they were treading on thin ice. Their first of two versions of "I Still Haven't Found What I'm Looking For" sampled whole chunks of the U2 hit alongside a spoken adaptation of the lyrics and some garbled speech from CB radio. The second version, free of samples but heavy on the melody courtesy of a kazoo chorus, featured choice out-takes from two Casey Kasem tirades that turned the concept of Top 40 music into a comical farce. **"This is bullshit. Nobody cares,"** Kasem was heard exploding as he uttered U2 guitarist The Edge's name in disbelief. **"These guys are from England and who gives a shit?"**

Negativland did. It dressed its record's sleeve up with a giant "U2" and a picture of the spy plane that the Irish band is named after. On first inspection, the record could've been construed as a new release by U2, and that, the band says, was the intention. "We did it as an example of something not being what it seems to be," they claimed in a press release. "We did it for laughs."

Most people who heard it indeed chuckled. But not Island Records or U2's publishers, Warner-Chappel Music. Poised to release *Achtung Baby*, they instead threw the legal book at SST and Negativland within two weeks of *U2*'s release. Their lawsuit cited copyright infringement for sampling without permission, and claimed that the sleeve was **"A consumer fraud, and a blatantly unlawfully attempt to...dupe U2's millions of fans...into believing that this 'new record' is the widely-anticipated new album by U2."**

Naively perhaps, Negativland claims to be shocked by Island's heavy-handed reaction. "The idea that a group like U2 would notice a group like us, or even if they did, that they would care, seemed hard to believe," said the group's spokesman Mark Hosler. "Given all their rhetoric, why would a supergroup like that turn around and crush somebody in an act that would look like censorship?"

In fact, U2 didn't notice Negativland's record. Island and Warner-Chappel, who did, merely sued on the band's behalf and to protect their own interests. And, apparently before U2 knew what was happening, Island had demanded the destruction of all available copies of *U2*, the handing over of the masters, artwork, and all copyrights, and payment of their legal fees (around $30,000). "Preferring retreat to total annihilation, Negativland and SST had no choice but to agree to comply completely with these demands," Negativland claimed in a press release a few weeks later.

And that, perhaps, is where the story should have ended, with an independent record label and an experimental art-music group learning the hard way the limitations of appropriation and parody. Except that

Negativland is not just any art group. This is a band that once got mass mainstream media attention by simply inventing an outrageous news story (holding their track "Christianity is Stupid" responsible for a 16-year-old's ax murders of his family) that nobody bothered to check. Being sued in the interests of the world's most conscientious major rock band was simply more "grist for the mill." Negativland went public, pitching themselves as art Davids against U2's rock Goliaths. With the rock media firmly on the little guy's side, U2 came off as humorless bullies. Suitably chastised, they urged Island to back off. But it was too late.

"I have been getting a huge amount of hassle from the members of U2 not to press for payment," Chris Blackwell wrote in a fax to Negativland in November 1991, in the same week that a settlement between SST-Negativland and Island-Warner/Chappel was agreed. "It has cost Island $55,000 to pursue this claim which could have been avoided in the first place if you had phoned or written a letter to the manager or myself, when you were contemplating the release. At this point I am not prepared to eat these legal fees." SST paid up.

Why hadn't Negativland or SST approached Island or Warner-Chappel for permission to sample a U2 song and print a deceptive sleeve? On the band's part, out of artistic disrespect for the copyright laws, perhaps. "Part of our whole argument is that these companies are getting undeserved control over all this work," explains Mark Hosler. **"If the amount of control now being exerted over the ownership of our culture had existed from day one of human kind, we wouldn't have art and music the way we know it now at all."**

On the label's part, it was partly because they too felt the release was not important enough to be sued over, and partly because they felt the band's contract with them indemnified SST from damages: i.e., that were there a lawsuit, Negativland would pay the costs. Greg Ginn therefore now publicly held Negativland 100% responsible for the $90,000 he claimed to have spent on the case. The members of Negativland disputed this interpretation of the contract; they also denied Ginn's assertion that they had spoken about the situation many times, which incensed the label owner.

"What about the *Helter Stupid* records or *Escape from Noise*?" he asks, citing the group's two previous sample-heavy releases. **"It should be obvious these issues would have come up. No. They're lying. They came up every time, and every time the group promised to hire lawyers in response and to take care of any problems associated with it beyond the initial contract."**

Most record contracts, it should be noted, have tightly worded clauses that do indeed hold the artist liable for infringement of anyone else's copyright. But, according to Adrienne Maddock, a lawyer who teaches at the North Carolina Central School of Law and who specializes in copyright issues, "It's almost like [SST] forgot to put the clause in the contract. The contract is pretty poorly drafted. The exclusive nature of the warranty [that does exist in the contract] is that Negativland promise they're not minors."

This opinion was backed up by at least one prominent music business lawyer, who added that by law the group would nonetheless be responsible for any damages, unless the record label had seen the artwork, heard the music, and understood the risks involved—which it is hard to believe SST didn't.

The Court's Final Judgement, Order, and Decree

STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
NOV 21 1991

ISLAND RECORDS LTD. (a United Kingdom Corporation), ISLAND RECORDS, INC. (a New York corporation), WARNER CHAPPELL MUSIC INTERNATIONAL LTD., (a United Kingdom corporation), and WARNER/CHAPPELL MUSIC, INC. (a California corporation), Plaintiffs, vs. SST RECORDS (an entity), SEELAND MEDIA-MEDIA (an entity), NEGATIVLAND (an entity), Gregory Ginn (an individual), Chris Grigg (an individual), Mark Hosler (an individual), Don Joyce (an individual), and David Wills (an individual),	) Case No. CV 91-4735)))) FINAL JUDGEMENT, ORDER AND DECREE) AS AGAINST DEFENDANTS) SST RECORDS, GREGORY) GINN, SEELAND MEDIA-) MEDIA, NEGATIVLAND,) CHRIS GRIGG, MARK) HOSLER, DON JOYCE) AND DAVID WILLS))) DATE: October __, 1991) TIME:) PLACE: Courtroom) (Judge A. Andrew Hauk)

Perhaps that's why SST sent the band an additional letter for them to sign that would confirm that they were 100% responsible for the costs. Denying that had ever been their agreement, Negativland refused, but offered to pay 50% of the costs out of future royalties anyway, on the basis of shared responsibility for putting out a record that was obviously contentious.

According to Hosler, Ginn refused to talk directly with the band members after their counter-offer or to consider action other than their signing his proposed letter. And so, in December 1991, Negativland walked from the label. **"We can no longer put our faith behind a company that can turn so unpredictably against the very people they claim to assist,"** they wrote in their severance letter.

Greg Ginn has developed a feisty attitude and a headstrong business mind over the years. In his Black Flag days, he and Dukowski spent a week in jail for contempt of court, after releasing a record themselves when under contract to a distributor that was about to go bust. Now, in February 1992, Ginn replied to Negativland's actions by writing an amazing four-page press release that twice called Negativland's Mark Hosler a **"lying motherfucker,"** that contended the group was merely **"an occasional hobby"** for its members, and repeated that the group members all had **"cushy," "corporate day jobs"** (which the band vehemently denies). **"Negativland has treated the whole episode as a joke at SST's expense,"** he stated. Even for a punk rock label such as SST, unafraid to speak its mind, it was an unprecedented attack that didn't help SST's standing in the media, or its relationship with other bands.

In fact, SST was already involved in a battle with the Meat Puppets. Appointed as the group's first manager, Jaime Kitman, who also manages Pere Ubu, They Might Be Giants, and others, says he examined the group's royalty statements and found **"some serious irregularities,"** specifically that SST had registered the Meat Puppets' publishing without, the group insists, its permission. Unable to contact Greg Ginn directly ("I finally got a call back from his secretary, who said, 'He has nothing to say to you, he won't talk to managers,'" Kitman claims), Kitman wrote a strongly-worded letter in February 1992.

SST responded by suing the Meat Puppets. Rather than "folding our tents," the Meat Puppets countersued, citing various financial irregularities. Kitman began talking to other groups who had been on SST, realized there was a history of unhappiness with the label, and so, in September 1992, drafted an open letter to the music business—essentially calling on SST to mend its ways—that he circulated among former and current SST groups for comments and approval. Its final words were, **"Friends don't let friends sue bands." "It was our position,"** says Kitman, **"that what they had done by suing the Meat Puppets was essentially to violate the Geneva Convention of indie rock."**

Greg Ginn and SST didn't seem to care. After getting hold of the letter, they amended their lawsuit to include Kitman as a defendant and then sued him and the band for libel to the tune of $500,000. (The case has not yet come to court.)

By this point, SST had also brought in lawyers against Negativland, demanding the group pay the full 100% of SST's legal fees in the Island case (and return $4500 in advances for two cassette-only releases). Negativland kept to its offer of 50%, which would still mean foregoing royalties for years to come—years longer, perhaps, than SST wanted to wait.

"Unfortunately [for Ginn]," says Mark Hosler with a rich sense of irony, **"Negativland seemed to be interested in continuing to make this thing into a giant conceptual art piece."** He is talking about the magazine that the group published in September 1992, called *The Letter U and the Numeral 2*, which boldly gathered various letters, press releases, and lawsuits pertaining to the *U2* record and Negativland's tribulations with both Island and SST and included a free CD featuring a 30-minute discourse on the ethics of sampling. It was a fascinating read and, even if Negativland's missives seemed deliberately designed to irritate people, it was not hard to sympathize with a group that had set out to make a satirical piece of music and had ended up financially bereft and falling out with its label.

SST, which claimed to be $90,000 down thanks to Negativland's satire, had no such pity. In November 1992 it finally sued the group, not just to retrieve legal costs in the *U2* case, but for the return of the $4500 in advances, for printing a credit report on SST in its magazine, and for copyright infringement over the reprinting of the label's press releases and bumper stickers (the ones that read "Corporate Rock Still Sucks").

Talking with Ginn about these issues, it quickly becomes apparent that SST, a label built on constant output of uncomplicated underground rock, was always the wrong label for a conceptual art band intent on stirring up trouble like Negativland.

"Some of their stuff has been very funny and very entertaining," Ginn says, when asked what he ever saw in them. "But they have always been very difficult to work with in terms of their honesty with us, even prior to this case."

He denies that the group has "any philosophy" on the sampling, satire, and appropriation issues, even though its recorded and printed history would have to suggest the opposite. "Their interests have nothing to do with the betterment of a musical community. They're very elitist in regards to other musicians and performers. **I think there are more important arguments [about appropriation, etc]., but I don't think this venue of inaccurate information is the way to solve them."**

Ginn seems particularly upset about the printing of the credit report in Negativland's magazine, which apart from claiming to be illegal, he says, is "incomplete" and "altered." "It is altered in that we didn't print the entire information," agrees Hosler, who says the report was five pages long. **"It was a tactic. The point of putting it in there was to show that whatever SST is to**

Island, we are to SST."

Negativland's refusal to return the $4500 advance for the two cassette releases may be hard to defend, even though they had returned $200, pleading poverty and offering to repay the money from royalties. The courts might not agree with Negativland that this issue is at all related to the *U2* case.

As to the rather facile charge of reprinting press releases, which must be the intention of writing them in the first place, "I don't really care," Ginn says. "Do I owe them a nice lawsuit? It's called a press release. It was not a page for a booklet that was to be sold at a high price with a CD."

And citing Negativland's expertise at media manipulation, Ginn asks why he sees as **"the one relevant document"**—SST's contract with the band that he believes holds them responsible for the legal fees—is missing. **"Why are they hiding it when they print everything else? Isn't that suspicious? Maybe they're lying about something?"**

But Negativland willingly forwarded that contract to this writer upon request. The only clauses concerning any indemnity had been clearly reprinted in correspondence used in their magazine. This time, it seems, whatever is proved in court, Negativland has been playing the media fairly.

"We've done a rather strange and unusual thing," says Mark Hosler, "which is to document everything that happened and release it to the people, and it ends up making [Ginn] and his record company look like the hypocritical and unethical people that I think they are.... Greg Ginn is bringing the same copyright laws down on us that were brought down on him and us by Island Records. This is going to look hypocritical and unprincipled to the public."

"It must be emphasized that U2 has cultivated a clean-cut image, and its recordings never use such [foul] language."

—excerpt from Island Records and Warner-Chappel's lawsuit against SST Records, Seeland Media, and Negativland, 1991.

So what were Island Records and U2 doing all this time? Despite receiving only the most basic correspondence, Negativland continued to pound both parties in various press missives and private letters. While SST suggested U2 do a benefit concert to pay the label's legal bills and released a **"Kill Bono"** T-shirt, Negativland focused on the legal and moral implications. Their sampling of U2, they were beginning to realize upon talking to lawyers, could well have been justified in court as **"fair use based on parody."** According to Adrienne Meddock, just one of many lawyers fascinated by the case, **"I think it would have been a great opportunity to try and litigate the larger issue of the appropriation of art in the musical and visual fields."**

But the chance had been sadly missed—for good. Negativland claims it was encouraged to settle, not fight, the case, by SST; the label says it had no choice. "We took it to lawyers, and they said 'This will cost you more money than you have to fight,'" says Ginn. "Negativland were welcome to work on that when it was needed. They were being sued right along with us."

In June 1992, the San Francisco-based magazine *Mondo 2000* landed an interview with The Edge and brought in Negativland's Don Joyce and Mark Hosler to conduct it. After setting The Edge up by having him admit that U2's "Zoo TV" live show was sampling TV broadcasts without copyright clearance yet charging people to see it, they revealed their true identity and the fact that they had been sued by Island on U2's behalf for a similar sin. A good sport, The Edge engaged in a constructive dialogue, which focused on whether U2 should tell Island to let its work be sampled with impunity, and whether a band of U2's size was powerless to prevent its label from aggressively suing people without its knowledge. At the interview's end, Hosler, in a typically absurd Negativland move, asked The Edge to lend them the $15-20,000 they needed to start their own label. (The Edge said he would genuinely consider it; he never got back in touch.)

By now, U2 has pressured Island to give the record back to Negativland. But the company wrote its best-selling band that it had been put on written notice by Casey Kasem's attorneys that any re-release would result in a lawsuit.

Which brought Casey Kasem directly into the picture for the first time. In April 1992 he was asked his views about the record in a radio interview. **"I'm not going to complain about it,"** he said. **"It's a free country and we have the first Amendment so...no problem."** An admirable position from someone who was being publicly ridiculed, it nonetheless contradicted Island's recent letter to U2. Negativland therefore wrote to Kasem directly requesting his permission to have the record come out again, only to receive a swift reply from his lawyers clearly stating, **"Mr. Kasem will <u>not</u> grant such permission and will pursue all legal remedy available to him in the event you release the U2 Negativland single again...."**

To Negativland, Kasem now became "another person who is saying one thing and doing another." And so Negativland asked its fans to write to him requesting he change his mind; he in turn sent back a form letter that took refuge behind the fact that the record had been declared illegal for sampling U2. **"The First Ammendment is no excuse for theft and copyright violation,"** he wrote. **"It's not a shield for greed, arrogance and disregard for other people's rights."**

Requested to comment specifically for this feature, Kasem refused a personal interview; he did however, fax a specially-prepared statement. In it he stated that he had not sued, tried to sue, or even written to prevent anyone from playing the **"<u>original tape</u>,"** a circumlocution omitting the fact that he <u>had</u> taken legal action to prevent the actual Negativland <u>records</u> from coming out. (He said he had been assured by Island that it had never addressed the issue of bringing the record back out, which contradicts one of the documents printed in Negativland's magazine.) His objection to the record, it seemed, was that it had been released purely **"for profit,"** which went **"beyond any First-Amendment-rights issue."**

(It's worth questioning whether Kasem could win a lawsuit over the record's release. Negativland could well argue that as a parody of a public figure, its use certainly <u>is</u> protected by the First Amendment.)

Negativland would deny that it releases records purely for monetary reasons. As a band on the fringes of the underground that sells a mere 10,000 albums, the members have long given up on the idea of a lucrative career from music. And they raised these points in the first press release on the matter, in November 1991:

"For the law to claim that this alleged motive (economic gain) is the sole criterion for legal deliberation is to admit that music, itself, is not to be taken seriously. Culture is more than commerce. It may actually have something to say about commerce. It may even use examples of commerce to comment upon it."

Anton Corbijn

"There's a feeling when you start out that a record company is this thing that comes along and gives you a big bag of money and you go off and be a rock star for the rest of your life."

—Bono, U2, 1984

Negativland has received a phenomenal amount of publicity from the *U2* episode, which it admits means, "For a little while we have this little window where more people are going to be interested." The new Negativland album will be out this spring on the band's own label (using money borrowed from a fan); entitled *Free*, "It's all about our perceptions of America's perceptions of itself." It does not have any recognizable samples.

"At some level where you're floating above yourself looking down at yourself having this life," says Mark Hosler, "everything that happens with this is totally fascinating and interesting. Looking back on it, it was all pretty fun and it certainly challenged us to rise up to our best level of responding."

Greg Ginn sees it as a cut-and-dried case of a band reneging on an agreement, and warns this journalist that he is merely falling prey to Negativland's dark intent. "The media has been misfed information [by Negativland] before. I don't think it's changed in this situation. You're part of spreading the inaccuracies that they've set up. They can laugh at this article a year from now—and how the media's accepted their story."

Hosler says that Negativland has given up hope of trying to talk intelligently with the various conflicting parties over the record. "You don't get to be U2 selling 14,000,000 records, you don't get to be Chris Blackwell or Casey Kasem or Greg Ginn by going through your whole life being a really nice guy. There's no way you can be that successful in the public media; you have to be really aggressive yourself or you have to surround yourself with people who are aggressive for you—which is part of what I think U2 is. That's the Faustian bargain they've made."

The whole sad story raises so many questions—about the wording of record contracts, about the validity of supposed "Oral Agreements," about sampling and satire, about Freedom of Speech versus Invasion of Privacy, and about media manipulation versus the truth. Trust is merely the first casualty.

And there is, for now, a final, deep irony in this perplexing and consistently fascinating saga. After being sued by SST, Negativland was advised by various legal experts that its best line of defense was to attack. And so it too joined the club, countersuing its former record company with a 40-page lawsuit. The two cases, which will be heard together, will probably not go to trial for a year.

The *U2* Negativland CD is now worth $75.

45. Negativland Issues Summons

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Don Joyce (an individual); Richard Lyons (an individual); Chris Grigg (an individual); Mark Hosler (an individual); and David Wills (an individual), a.k.a **Negativland,**

PLAINTIFFS

v.

All record stores, record distributors, journalists, newspapers, radio and TV, a.k.a. **THE MEDIA,**

DEFENDANTS

CASE NUMBER

CV-
93-180G10-8

SUMMONS

TO THE ABOVE NAMED DEFENDANTS:

You are hereby summoned and required to notice the following claims made by attorneys for **Negativland,**

Gus T. Stucky
Hal O. Stakke
STUCKY AND STAKKE
1920 Monument Blvd., Suite MF-1
Concord, CA 94520

and to distill these claims into your own words within 20 days after service of this summons on you, exclusive of the day of service. If you fail to do so, judgement by default will be taken against you.

I.

FIRST CLAIM

1. Negativland is informed and believes, and on such information and belief, alleges that on or about April 1, 1993 they are making their new CD entitled **"FREE"** available to any and all recording outlets in any jurisdiction.

2. Negativland further alleges and believes that this recording is the first full length studio recording they have released since 1989's "Helter Stupid".

3. Negativland further alleges and believes that **"FREE"** contains 12 cuts, consisting of 59 minutes of music, found sound fragments, vocals and noise relating specifically to a well known convenience store chain, torture, the quality of urban life, Cadillacs, firearms, the bible, interstate trucking, geriatric discomfort, big dogs, bicycle safety, alcohol consumption, driving in circles, death, organ buttons, religious dialectics, and the truth about our National Anthem.

4. Negativland further alleges and believes that **"FREE"** contains absolutely no reference to, nor appropriation from, the musical entity known as **U2**, although Casey Kasem is mentioned once.

5. Negativland further alleges and believes that **"FREE"** is the result of two to three years of careful scrutiny concerning a diversity of American lifestyles, and the attitudes and emotions which emerge because or in spite of them.

6. Negativland further alleges and believes that they are manufacturing **"FREE"** on their own re-activated independent label **SEELAND RECORDS** (Seeland 009CD) and distributing it throughout the world via San Francisco's **Mordam Records** (for North America) and Zürich's **RecRec Music** (for Europe).

7. Negativland further alleges and believes that they are funding this release through a loan obtained from a helpful, concerned, and moderately wealthy fan of the group and that they will pay him back no later than six months from the release of the recording, with 10% interest. Negativland further alleges and believes that said moderately wealthy fan is **not** the person commonly referred to as The Edge.

8. Negativland further alleges and believes that all rights of ownership in **"FREE"** will belong to the band members, and not to any other record label or music publishing company, in perpetuity.

For more information contact SEELAND RECORDS, 1920 Monument Blvd. MF-1, Concord CA 94520, fax 510-420-0469

46. U2 Issues New Album

47. Greg Ginn Issues New Album

GREG GINN
GETTING EVEN
CRZ 029 (LP/CA/CD)
produced by GREG GINN

GETTING EVEN, produced by GREG GINN, is his solo debut on CRUZ RECORDS, a company GINN founded seperately from SST in 1987 that is now marketed and distributed by SST. The album version of "Payday" is included on GETTING EVEN, a tune released in the Spring of 1993 in a remixed version. GETTING EVEN is an overwhelming, angry album with GINN on guitar and vocals, along with David Raven on drums.

As the guitarist, co-founder and principal songwriter/lyricist through the ten year history of BLACK FLAG, GINN shaped the blueprint of a "do it yourself" attitude in music. As the sole lead guitarist of BLACK FLAG, GINN led the band through various line-ups (four vocalists, four bassists and five drummers) and directions that were anti-static. "TV Party", "Rise Above", "Slip It In" and "Six-Pack" are but a few of GINN's songs that are etched in the minds of BLACK FLAG supporters.

GINN earned a degree in Economics from UCLA in 1975 and it was during this period that he first started playing guitar. SST RECORDS was co-founded by GINN and the original bassist for BLACK FLAG, Chuck Dukowski. GINN's mail-order electronics parts company he had been running since his early teens helped to fund initial SST releases by BLACK FLAG, MINUTEMEN, SACCHARINE TRUST and THE MEAT PUPPETS. Today GINN is the sole owner of SST, CRUZ and NEW ALLIANCE RECORDS.

48. Negativland's Open-Letter Proposal to Get the *U2* Record Back

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

June 10, 1993

Via FAX and US Mail

To: Messrs. Chris Blackwell and Eric Levine, Island Records
Mr. Don Biederman, Warner/Chappell Music
Messrs. Bono, The Edge, Larry Mullen Jr., and Adam Clayton (U2)
Mr. Paul McGuinness, Principle Management
Mr. Casey Kasem

Gentlemen:

Greetings once again from Negativland. As you all know by now, we will never stop trying to get our little record back until a resolution is achieved. Some journalists and acquaintances of ours who continue to keep tabs on this saga tell us that U2 and their management are still open to ideas that would help us rescue our *U2* single from suppressed oblivion. We understand that Island Records is unwilling and/or unable to return our record to us solely because of Casey Kasem's threats of legal action against Island if they do so. We also understand that Casey Kasem continues to claim that the only reason we made the *U2* single in the first place was for "profit".

After discussing the above among ourselves and our lawyer (Negativland has now obtained pro-bono legal services in order to defend against SST's suit against us) we offer the following proposals to you all:

To Island Records and Warner/Chappell Music:

We propose that Island and Warner/Chappell agree in principle to return our record to us providing we can obtain a written release from Casey Kasem. We understand that returning our record to us would involve dissolving the injunction against us, granting us a license to use the copyrighted material (since you now own the copyright on our recording) and granting us a clearance license on the underlying U2 recording we used in the single. Should re-release eventually occur (our plan is to out it out on our own, self-distributed Seeland Records label), we would of course add a sticker or graphics to your specifications that would make it clear that it is not a recording by U2. All we are seeking from you at this point is a simple 1-paragraph agreement in principle, and we would of course have no authority to release the record until and unless we obtain Casey Kasem's written clearance. An agreement in principle from you would lay the responsibility for the next step towards re-release squarely and solely on negotiations between Negativland and Casey Kasem; if his permission is forthcoming, a more detailed agreement between you and us would be drafted at that point.

To U2 and Paul McGuinness:

Talk does not have to be so cheap. You can entreat Island and Warner/Chappell to follow through with this safe, simple, and reasonable proposal. Your advisers may balk at this, but it is your intent that counts here. Please feel free to contact our lawyer with any questions you may have about our proposal. We could have our lawyer write up a first draft of this brief agreement in principle with Island and Warner/Chappell if that would speed things along.

3920 MONUMENT BOULEVARD #E-N CONCORD CA 94520 510-420-0469 FAX

To Casey Kasem:

The work we are doing is not about profit! Even we can think of ways to make more money than this. Is our corporate music culture now so divorced from principle that profit is the only possible motive for everything? If so, we hope that your otherwise admirable social consciousness can still come to terms with the alien idea which we pursue outside the corporate mainstream. That idea, in the broadest philosophical sense, is that the private ownership of mass culture is a bit of a contradiction in terms, and it is time to liberalize the "fair use" aspect of copyright law. As audio artists, we pursue a uniquely contemporary and wholly appropriate creative process which inevitably emerges out of our electronic age of media saturation and the reproducing technologies available to all consumers. If our work is important at all, it may be because it is a much beleaguered form of grass-roots free expression that attempts to exist in spite of a system that employs lawyers who set the boundaries for artistic experimentation. To prove our intent to you, we offer to donate *100%* of our royalties from our re-release of the *U2* recording to the charity or cause of your choice, forever!

To Everybody:

We hope that all of you will consider these ideas seriously. In the future, we would be pleased to exert every effort to publicize your actions to assist us, just as we have publicized your efforts so far to stonewall this thing into forgetfulness. We look forward to hearing from you. If you'd prefer to discuss this proposal with our lawyers, we can put you in touch with Jeffrey Selman of Severson & Werson, San Francisco.

Sincerely,

–Negativland

49. Timothy Leary?

Beverly Hills, CA 90210

To Chris Blackwell

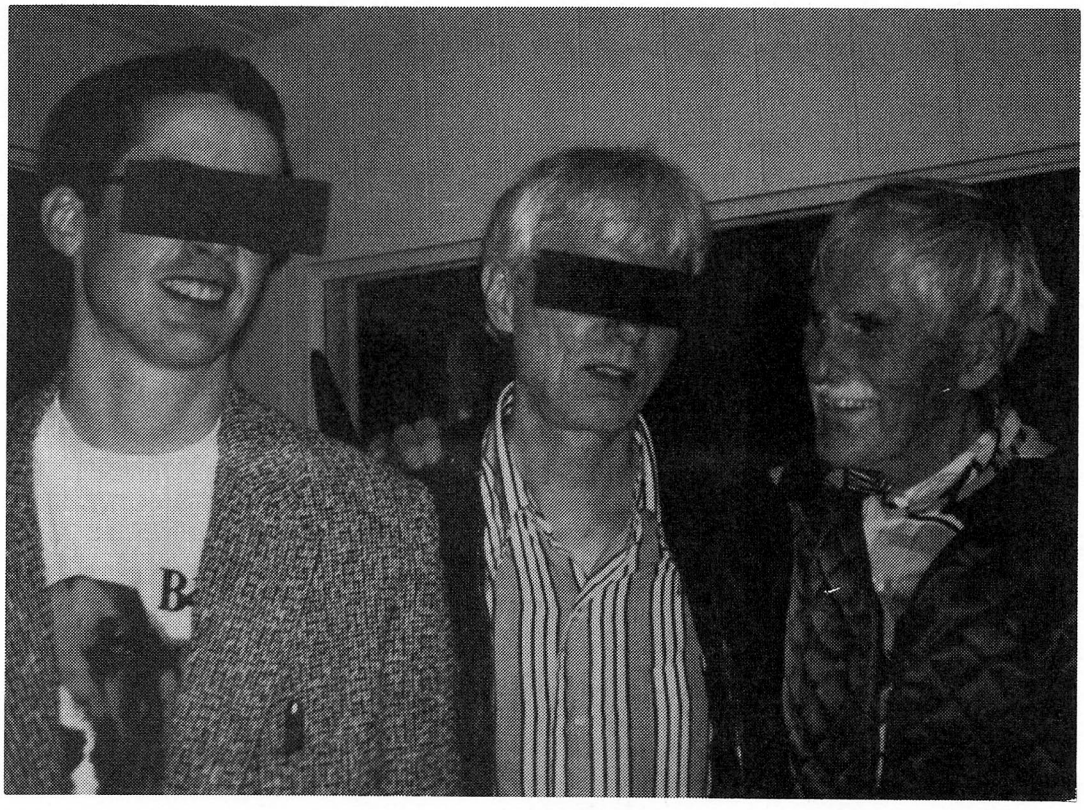
Re. Negativland

Dear Chris-

I know these guys. They're OK. I hope you can help them get their record out. Call me when you're in town.

Timothy Leary

TL



50. Warner-Chappell Responds to Negativland's Proposal

WARNER/CHAPPELL MUSIC, INC.
10585 Santa Monica Blvd.
Los Angeles, California 90025-4950

FACSIMILE TRANSMITTAL

TEL: (310) 441-8750
FAX: (310) 470-2875

FAX #: (510)-420-0469

DATE: June 21, 1993

TO: Negativland

FROM: Don Biederman
Senior VP/General Counsel

RE: U2

****

Gentlepersons:

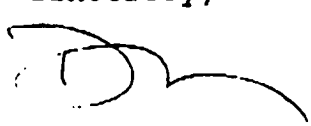
I've received a copy of your fax of June 10.

Apparently you have not yet become aware that we are no longer the administrators of U2's publishing. This distinction now falls to PolyGram Music. Even when we **were** the administrator, we would not have been in a position to "agree in principle to return [your] record to [you]" since -- as I believe we explained on an earlier occasion -- an administrator acts at the direction of the originating publisher, not vice versa.

Now, however, we are not involved **at all.**

On a personal note: I presume that I have you to thank for all the "ink" I received in the underground press over the last year. In addition, I received some really amusing letters, and it was a lot of fun. However, since we are no longer involved, I will reluctantly forego the attention in the future.

Sincerely,



51. Death Threats, Casey Kasem, and A Call From The F.B.I.

In May and July of 1993 members of Negativland were contacted by the Federal Bureau of Investigation.

FBI: Are you Mark Hosler?

Mark: Yes...and you say you're with the FBI?

FBI: Yes, um...

Mark: Sorry, but that's sort of hard to...(laughs)

FBI: You've never heard of a female FBI agent?

Mark: No, it isn't that. I just don't know why I'd be getting contacted by the FBI

FBI: Well, I'd think by now you would have heard about this from the other members of your band. They were also contacted by the FBI

Mark: Uh, right.

FBI: I believe there's some litigation between your band Negativland and something regarding Casey Kasem. Is that correct?

Mark: We have no litigation between us and Casey Kasem. No we don't.

FBI: But against his record company?

Mark: No, not his company. We were sued by a record company named Island Records for copyright and trademark infringement because of a record we released that infringed on their copyright and trademark. It also happened that our recording used some unauthorized out-takes of Casey Kasem from his ***American Top Forty*** radio show.

FBI: O.K. That's pretty consistent with what I have here. Well, um, what has happened is that a person who calls himself Ray has made threats against the Kasems, and in those threats he was telling Casey that he'd better stop messing around with the Negativland band and give them their record back.

Mark: What kind of threats did he make?

FBI: They were life-threatening threats. Threats against Casey Kasem and his wife.

Mark: How did he recieve these threats?

FBI: By telephone. He recieved these threats on his home telephone. What we're interested in knowing from you is if you have any knowledge about this Ray person, who it could possibly be...the calls are supposedly from Cincinnatti, Ohio.

Mark: Really?! (laughs) Right. This whole story is...um, well I guess about a month ago both Chris and Don spoke with an FBI agent named, I believe, Dave Evans*. Is that right?

FBI: Yes.

Mark: And they told him the whole story about our ***U2*** single and the lawsuit and the magazine we put out which documented the whole thing?

FBI: Yes.

Mark: Well, one of the things that we did in that magazine, and also on a recent tour of ours, was that we gave out Casey Kasem's work address and fax number and we encouraged people to contact him and ask him to stop being such a hypocrite and stand behind his supposed principles and let Island Records give us our record back. And I guess this Ray person must've seen our show or read our magazine or saw some press release and took our ideas a little too seriously. We certainly weren't encouraging people to do anything other than write him letters and make their opinions known. In fact he got so many letters from irate Negativland fans that he now has a form letter response that he sends out in reply.

FBI: You did not include his home phone number?

Mark: No. We have no way of knowing what his home phone number is. What I'd like to know is, what circumstances led Casey to go so far as to have FBI agents contacting the members of Negativland? Can you tell me?

FBI: Actually, I can't. All I need from you is any knowledge you have about this this person Ray.

Mark: Right. And I don't have any. I do know that I recently saw this sensationalist television news program called ***A Current Affair*** and it had a segment on it about the Kasems recieving death threats. They interviewed Casey's wife Jean. So I guess they're generating publicity about this on T.V.

FBI: And where do things stand now between you and Kasem?

Mark: Well, it's kinda complicated, but...in recent interviews and public statements Casey has repeatedly said that the main problem he has with us is not that we did what we did, but that we did it for profit. So recently we've sent him a letter offering to donate 100% of the profit from our re-release of the "U2" single to the charity or cause of his choice. We'll do this if he lets us have our record back. There's more to it than that, but that's basically it. Unfortunately he's failed to respond.

FBI: Well that's too bad. It sounds interesting, I'd like to hear it.

Mark: Did you grow up listening to ***Casey Kasem's Top Forty***?

FBI: I remember hearing him, yeah.

Mark: I'd be happy to make you a copy. If you know his on-air personality, you'd probably find our record to be very, very funny.

FBI: It sounds neat.

Mark: And here we are two years after putting it out getting visits from the FBI!! (laughs) So...

FBI: (laughs) It's a time to remember. (laughs) "Whoa, you guys remember that record we released?"

Mark: Yes.

FBI: Yikes...yeah I'd like to hear it.

Mark: Well, I'll send you a cassette. Tell me where to send it.

FBI: (gives address) And going back to Ray, you know nothing about him?

Mark: No, the nearest we got to Cincinnatti on our last tour was Cleveland. You know this death threat thing is kind of unfortunate for us because we're trying to appeal to Casey's principles and sense of free speech and right and wrong and when you throw in something like a death threat, it's just one more thing to make him less inclined to respond to us.

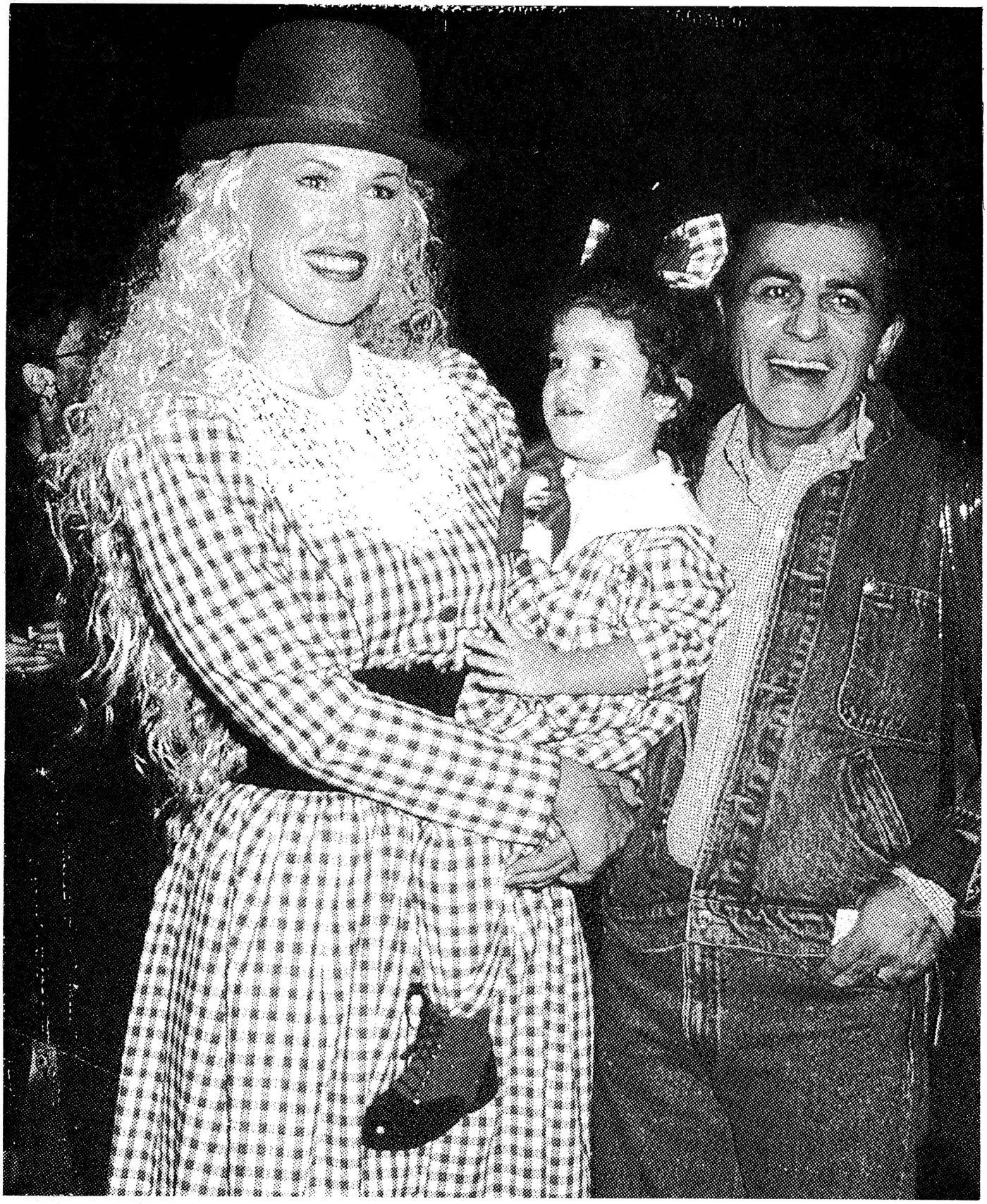
FBI: I agree. Hopefully he'll see the light and let you guys have your record back.

Mark: Well, if you talk to Casey, tell him we're hoping he responds to our latest letter.

FBI: O.K. (laughs) Thanks for your time.

Mark: O.K. Bye bye.

**This also happens to be the real name of U2's "The Edge".*



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Over to U2

When a spoof U2 record was released by an obscure group called Negativland, left, the Irish rockers' record company slapped on a law suit. But the band aren't playing along with it, says BRIAN BOYD

Speaking recently about the affair in the Irish Times, The Edge said that the most important aspect of the case was not the sampling of U2's music, but the cover of Negativland's single. ''Island freaked because Negativland's artwork made the release look like a record from U2 at a time just prior to the release of our album,'' said The Edge (Negativland's U2 was released in August 1991, U2's Achtung Baby was released in November 1991). ''We [U2] have, by the way, given permission to re-release the work in different artwork at their request, but unfortunately, Casey Kasem has refused to allow them go ahead . . . we feel very frustrated because we are being characterised as protectionist and paranoid when that simply isn't the case. We did all that we could, but Island felt there was a principle at stake and we had to allow them to exercise their right, even though we may not have agreed with the manner in which they did.''

The song, however, is not U2's to give back and when Island Records was contacted in New York last week, Eric Levine, the senior director of business affairs, said that the Negativland affair was an ''unfortunate incident''. When asked if the company would follow U2's lead and allow Negativland to re-release the single, he said, ''I have no intention to speak with you on this matter.''

Also speaking last week, Paul McGuinness said that he has no problem whatsoever with the record being re-released. ''There has been a certain amount of collateral damage done here. U2 have been persecuted over something which is not their fault. The legal action was taken by Island Records who don't have to ask our permission first. They were defending their own interests. I have a few copies of Negativland's single myself — we all think it's pretty funny,'' he said. ''This might all have turned out very differently if Negativland had simply sought permission off the record company and publishers before releasing their record. We often get requests in from bands wanting to sample our work and we regularly grant it.''

Mark Hosler of Negativland says that ''permission'' should not enter into the argument. ''We ourselves have been sampled all the time without our permission and we accept that. If the amount of control now being exerted over the ownership of our culture had existed from day one, we wouldn't have art and music the way we know it now at all. I can tell you one thing, before we released U2 we made anonymous approaches to Island Records about the possibility of copyright clearance and we were told that it was never granted,'' says Hosler. ''I believed The Edge when he said it was all done at a corporate level above the band's head, but I wonder if they, given what they stand for, should be embarrassed by what is being done in their name.

''Island's action against us has set a harmful precedent for music. I refer you to the histories of folk music, the blues, jazz and rock, all of which have always had creative theft as their modus operandi. The music business can try to reach the end of this century pretending that there is something wrong with this or they can begin to acknowledge the truth and make way for reality.'' □

Bono: prepared to grant artistic licence?
Photograph by Dave Bennett/Alpha

"...protectionist and paranoid..."

53. Casey Kasem Responds to Negativland's Proposal

Casey Kasem

August 16, 1993

Negativland

Oakland, CA 94618

Dear Negativland:

First, let me respond to your faxed, personal message of August 4th about the threatening communication my family and I received. You said, in part, that "although we have encouraged fans to write to you, we certainly never expected that anything like this would happen."

I understand that you can't know what every fan is likely to do. However, I should point out that your campaign has consistently painted me as some kind of bad guy standing in the way of your right to free speech, etc. Sooner or later, someone--taking your word for it--was probably likely to go further than you "expected" in championing your cause.

Fortunately, the incident has been handled by the authorities and whatever threat there was is past--I hope. But common sense and foresight should tell you that things like this can always happen when you adopt tactics and language such as that which you've been using.

*

As for your current proposal, you're right. I won't let the above incident prejudice my mind about it. My reasoning remains the same, regardless.

You're still asking me to let myself be a target--to be "shot in the foot", so to speak, in public for as long as your record circulates. I'm not a masochist; neither is anyone else I know.

My conscience tells me that it is unethical to allow material to be exploited that is in poor taste (because of language used during a studio session)...material that is edited to give the impression that I dislike the group U2 (when I don't dislike them)...and, in general, material that paints a negative picture of me. Why should I have my mistakes paraded in public by you or someone else, if I myself would not allow them to be? (And neither would anyone else in a similar situation.)

Although you offer "to donate 100% of our royalties from our re-release of the U2 recording to the charity or cause of your choice, forever!"--it's your name that's benefitting from the marketing--and mine that's getting slammed as a result of the presentation in your "creative" mix of other people's materials.

(more)

Casey Kasem

The more you persist in convoluted logic to defend your use of this material, the more the thought keeps running through my mind (and the minds of others, I'm sure): "They just don't get it, do they? Or else they don't want to." You've assembled a satire, a form of humor that 'slams' its subject. The more you grow up, the more you realize that slamming is harmful. It's a negative attitude. Perhaps the name you chose, Negativland, reflects that, to some extent.

You may not want to think about this, but how about changing your name and approach as well? I'm enclosing a condensed booklet of Norman Vincent Peale's classic, The Power of Positive Thinking. Pass it around; think about it. One reason I've succeeded over the years is by promoting a more positive approach to life, even though I'm aware that not everything in life lives up to that standard. But it's better than slamming others, including oneself, isn't it?

And if you're really serious about contributing to charities (mine or anyone else's), you can simply do so direct and accomplish a lot of good. You don't have to raise money for it by exploiting someone else's name, reputation and out-takes in a negative-toned album.

*

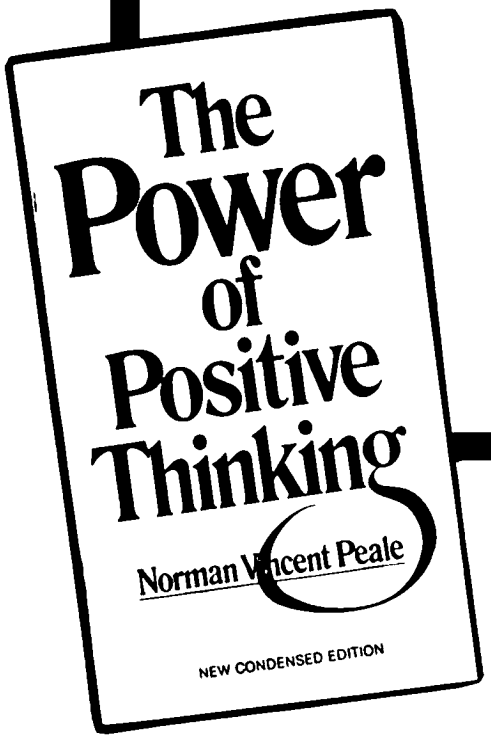
U2's manager, Paul McGuinness, has indicated in his fax (Aug. 5, from Dublin, Ireland) that "if Casey Kasem has no objections to your getting your records back neither do we." But there's still Island Records and the new holder of the publishing rights, Polygram Music, to hear from. So far, they haven't indicated any change from their earlier position.

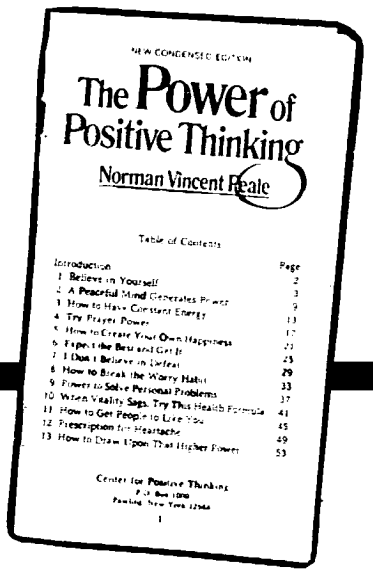
And for the reasons stated above, I don't wish to change my position, either.

I know many people consider your group quite talented. And I'm sure you are. I hope you will redirect your efforts into new products, not only legally sound but artistically fresh, positive and appealing. I believe you can, and I wish you success and prosperity in such efforts.

Yours truly,

Casey Kasem





54. Negativland Responds to Casey Kasem

"If you can't lick 'em, put 'em on with a big piece of tape."

September 14, 1993

Dear Casey,

Thanks for responding to our letter and for the time and thought you have obviously put into your reply. Believe us, it is appreciated when so many of our corporate correspondents brush us off with brief notes of momentary annoyance, if anything.

Maybe a more detailed dialog concerning our divergent paths through the foothills and mountain tops of show business would interest you.

We don't think we've unduly painted you as the "bad guy" in this situation. In every interview we actually have praise for you as a generally progressive, principled, charitable, and caring guy. We also tell people that you won't allow our record to return to us. (It's a problem child, but we love it.) So we may paint your behavior as ironic, but "bad" is in the eye of the beholder. If it does make you look "bad" to not return our record to us, that choice will always be yours to change.

Naturally, we have to wonder about the real reason why you can't let yourself do that. We presume you think you'll look even worse by allowing these embarrassing bloopers out, so you're suffering one kind of bad to avoid another. The question we pose is: which bad is *really* worse?

Feeling deprived of a valid creation, we asked people to write you and ask you to adhere to the principle of free speech, as you clearly advocated it in your interview about our record of April, 1992, in Las Vegas, Nevada. You responded to our fans with a form letter which sidestepped that issue entirely and accused us of theft and piracy. (The Pentagon Papers were "stolen" too. We don't use such terms loosely. We have specific working definitions of what is and what isn't theft in the arts, which perhaps we could discuss later.) In fact, your outtakes were not "stolen" by us - they were given to us by a member of the public who didn't "steal" them either. We have talked to many, many people who were familiar with those outtakes long before they encountered them on our record. (It seems to have had no effect on your career, either.) "Theft" hardly feels like the right word for using something so widely disseminated already. It's a unique-to-media aspect of the notion of "theft".

You also made it clear in that letter and in your statement to *Creem* Magazine that, more than anything else, you were upset that we were profiting from the unauthorized use of your out-takes. Now that we have offered to donate all the profits to any charity of your choice (an offer that remains in effect) you slide over and say that our "name" would still profit (probably true, and believe it or not, you would too!) and that you don't want to be associated with any "negative" energy or "slamming". Now you're getting closer to that core issue of public embarrassment which is probably the driving force behind your decision to suppress.

Here is a point to consider. The importance of avoiding what you perceive as public embarrassment has put you in conflict, in a publicly embarrassing way, with principles you otherwise espouse– principles of a free, open, and sometimes contentious democracy. Democracy *is* dangerous, and it's *supposed* to be. Ours claims to allow its diverse population to actually use their wits to, among other things, strive and contend

1920 MONUMENT BOULEVARD MF-10 CONCORD CA 94520 510-1420-10469 FAX

and oppose in order to pursue their own individual visions of improvement. This is an improvement over all previous forms of human society, and it didn't– and doesn't– come about purely on the basis of "positive" energy– some balloons get popped also. This is as it should be. Embarrassment is superseded by a larger effect or a better idea that's worth having regardless of any individual's possible embarrassment. But of course we each still stifle that principle at all costs when the embarrassment is our own. Yet we would know a lot more about Iran/Contra or the Waco Extermination if it weren't for suppression based ultimately in embarrassment.

We now find you are also supporting suppression. "*BUT THIS IS DIFFERENT!*", you say. We believe the above principle applies equally to the use of your material if we are to be consistently principled about our freedoms. The material in question has long since spread beyond the real-world limits of your personal control. Negativland heard that material and decided you had set a new standard to beat within the genre of bloopers. It spoke to us on various levels and was irresistible. As artists, we decided to put other things all around it to make a bigger picture that would then be "our" picture which attempts to speak on even more levels. We do this in a particular, real-world, direct-reference, musical collage form that is both surreal and familiar. Sorry, but we *like* that combination. When we are doing a critical parody, we must demand the right to do that without the automatic denial of required permission. You'd have to believe that Communism is good to disagree with that.

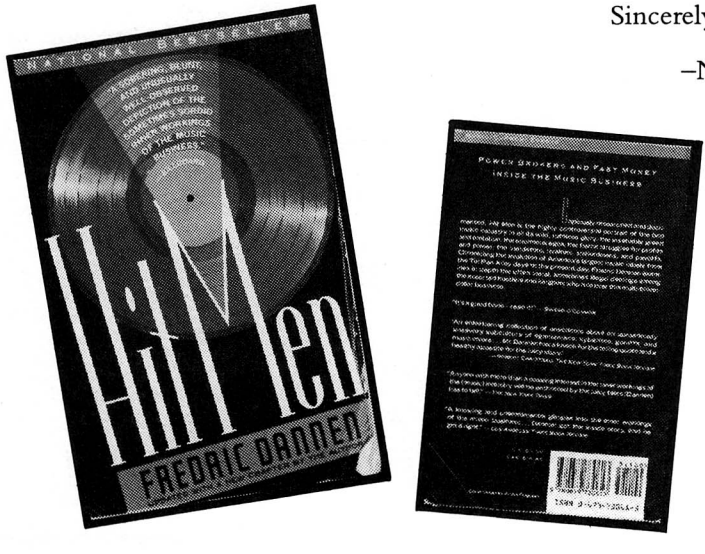
All satire and parody, in fact *all humor* involves some kind of "slamming". If "slamming" was scrupulously avoided, there would be nothing funny. If "slamming" was against the law, so would laughing be. Kermit Schafer's early collections of blue bloopers began what is now 40 years of persistent blooper fun. A unique child of the media, the unsuppressible charm of bloopers is as documents of the unintended and embarrassing moments we were never supposed to see. The effect (almost always humorous) is to release us from the illusionary, "professional" world the media intends us to see. Besides, when you suppress *creative* "slamming" you really begin to toy with the health of the culture. Where should the line be drawn between "important slamming" and "outlaw slamming"? "Good taste" had better not always be the supreme arbiter or we'll be surrounded by the stuff.

Speaking of "negative" energy, we've enclosed a copy of a book for you to read as we are reading yours. It's called *Hit Men*, by Fredric Dannen. You may have read this popular book already but in case you haven't, it presents many examples of how corrupt, cynical, and exploitive the corporate music industry is. It explains how most of those top forty hits you announce got there specifically because of bribes, intimidation, threats, and payola. You can't be unaware that you are daily associating with some of that "negative" energy. Is there any way to get some of the ideals of music into the music business? There sure is, but everyone in it just seems to yield to life's conflicting confusions.

Please excuse the length of this, but that's our say for now. Perhaps if we can continue this debate, you may begin to glimpse the point of our contention: What we are fighting for is a positive thing for the arts, and a positive thing for society and law as well. There is much more to say on this idea of public embarrassment and whether it should be "allowed" or not, especially within "social commentary" artworks. We hope you feel like writing back with your side of this argument.

Sincerely,

–Negativland



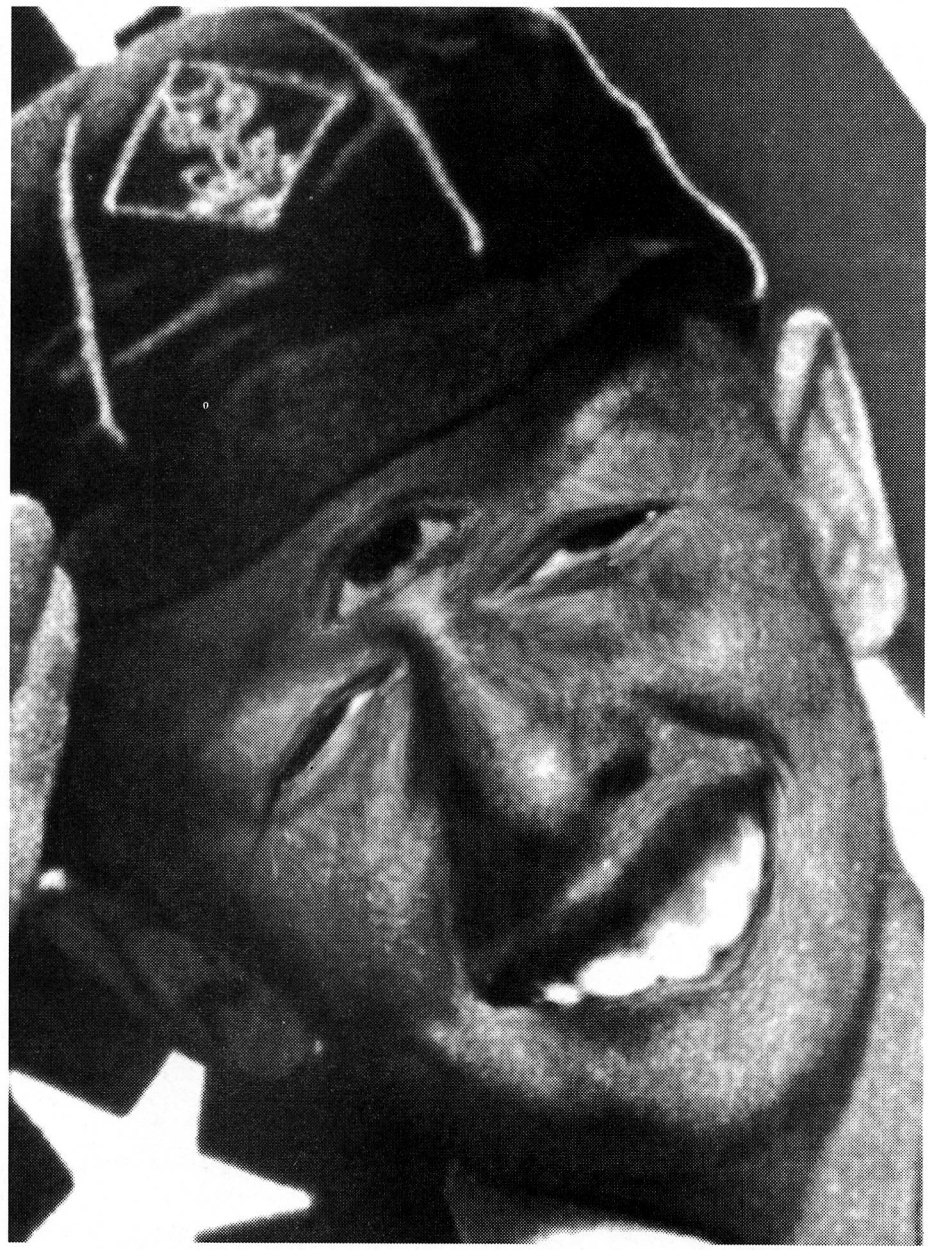
55. *Paperback Jukebox* Interviews Negativland, September 1993

Paperback Jukebox: So what's new with the lawsuit?

Mark Hosler: Things are coming to a head with SST. The trial date is being moved from Spring of '94 to this fall, which means that SST is now suddenly faced with the prospect of actually going to trial. And we don't think that they really want to take us to trial because trials are very expensive. A cheap trial would cost you about $150,000 and I don't think they want to spend that much money when...well, they're not paying us any of our royalties and in doing that they've basically paid themselves back for all the money they lost in the Island Records lawsuit. So it's a question of how serious Greg Ginn is about wanting to pursue this thing just to stop us from re-releasing our magazine.

PJ: Is that the main basis for his lawsuit against you?

MH: His lawsuit is about a bunch of different things. In the interest of telling the story correctly-well, not "correctly," but in the interest of presenting all sides of the story, we reprinted SST's press releases. We also reprinted a letter from Ginn's lawyer and we reprinted an agreement they sent us to sign, which we refused to sign. He's saying he owns the copyright on all these things, so he's suing us for copyright infringement, which is about as silly a thing as you can imagine. And he's suing us for reprinting their bumper sticker that says "Corporate Rock Still Sucks", which is a slogan, and you can't copyright slogans. *And* he's suing us saying we owe him all the money from the Island Records lawsuit, when we've been been offering to split it 50/50 all along and our contract with



them doesn't obligate us to pay them *anything*. He also claims we owe him two more Negativland releases and he's suing us for printing a credit report on SST Records that shows, I think, that the only "paranoid - upper - middle - class - malcontent - with - a - cushy - corporate - day - job" in this whole story is the owner of SST Records! So it would seem as if he's not suing us for anything in particular, but rather because he's extremely angry at us and vengeful and he wants to harass us and make us waste tremendous amounts of time and energy and money. Which, of course, he's succeeded in doing. But it's getting to the point where he's going to end up spending - we have free legal help and he doesn't, he's paying - so he's going to end up spending a huge amount of money just for the sake of principle, or his percieved idea of principle.

PJ: If it went to trial and was resolved in his favor, what could

he recieve from you?

MH: Let's say he wins the trial. He's still gonna have to pay his lawyers because the judge in this case has ruled that SST cannot be awarded attorney's fees. The two releases he wants aren't even finished and he can't legally force us to finish those. So the most he could get is the amount he now claims SST lost in the Island Records suit, $82,000. Now, we don't *have* $82,000. We don't have any money. I mean, *there's no money for them to get*. I have a broken-down '73 Volvo, we have some old recording equipment that doesn't exactly work great. Even if he technically won, there's not much he would be able to get from us.

PJ: Do you have any idea how long a trial might last?

MH: Well, I hope it doesn't go to trial. It's been a nightmare dealing with this. We've been told that 99% of all lawsuits like this never go to trial because no wants to spend that much money. They're all settled out of court. So my guess is, as we get closer and closer to the trial date and they start having to do all the pre-trial conferencing - this is one of things you do to prepare for a trial and just to prepare for a trial you can spend $40,000 - so maybe as those bills start to ring up he'll realize that we have nothing financially to lose by going to trial and he'll want to settle this out of court. The law firm that's helping us is the largest law firm in the state of California. With their help we've filed what's called a Summary Judgement against him to dismiss all of his claims. A Summary Judgement asks the judge to look at the claims someone is making in a lawsuit, to look at the law - in this case what does the law actually say about copyright infringement and fair use, credit reports,

slogans,etc. - and then we're asking the judge to throw the case out, to say it's not even a legal claim. Summary Judgments are for black-and-white situations. If you can convince the judge that the law doesn't even apply it can be thrown out of court. And I'm certain that at least some of SST's claims will be thrown out of court. I hope all of them.

PJ: And so if you win the case, you would be able to re-release the magazine?

MH: Yeah, well we're asking for a lot more than just that. We're trying to get SST's claims thrown out of court, but we're also trying to get our records back. We're saying that what SST has done in how they've treated us has violated our contracts so completely and utterly that they should not be allowed to sell *any* Negativland records. I don't know how far we'll get with that, but we had an interesting proposal which we were trying to explain to Ginn's lawyer the other day but his lawyer hung up screaming at our lawyer.

PJ: Do you ever get the feeling that Island Records was trying to make an example of you, to show what happens when you mess with giant record corporations?

MH: Well, I think that's hard to answer, but you have to understand - I think if you work in the corporate world, and certainly if you work in the corporate entertainment world, you have certain mindsets that are just a part of your way of looking at the world. One of those is - "this is our property, we own it, and we're going to protect it at all costs". If they literally thought of making an example of us, I don't know. It's certainly had that effect. I've met musicians who are very aware of our case and it's had a chilling effect on people who were think-

ing about sampling stuff. I wish it didn't, but it has. Someone who knows Island Records president Chris Blackwell has told us that he was *very* offended by what we did and he took it personally. It's also become clear to us, though they continue to deny it, that U2's management *was* aware of this from the very beginning and somehow gave Island the green light to go ahead in their action against us. You know, we're still trying to get our little record back. At this point, U2 publicly supports this position but claims they have no influence over Island Records, which is ridiculous considering the size of their band and the fact that they actually own stock in Island! We think that their public position is for very cynical reasons. They don't really want our record to be out there but with U2's new multimedia, post-modern, ironic, reflexive, cyberpunk image-- a very clever career move, by the way-- they sort of have to take our side in all this. As for Island Records' decision, it could have been just a kneejerk reaction. As far as they're concerned, we've stolen property that does not belong to us. One of the things you're not aware of is an essay we passed out on our last tour called "Fair Use". It outlines our artistic, moral, ethical, legal and philisophical position about these issues. And obviously our way of looking at this doesn't enter into their minds at all. They're still living in the 19th century, in another age, where they think they can control all of this information.

PJ: Don't they have a tighter grip on it now than they ever have?

MH: Yes, they do. But then look at something like the Internet. Do you know what I'm talking about - these electronic bulletin boards?

PJ: Sure.

MH: Our magazine is up on the Internet now. Theoretically it's available to millions of people. Now of course there aren't that many people interested in this story, but to anyone who wants it, it's there. Someone just put it up there. What is SST going to do to stop that? Nothing. There's nothing they can do. In fact on the Internet there's a digitized version of our "U2" single. The fidelity's not that good, but that will change as computers get faster and faster. What is Island Records going to do to stop that? Eventually you'll be able to put CD-quality sounds up on the Internet and people will be able to download it anytime they want. It doesn't matter how hard you try to own it, control it or legislate it, the technology has gotten away from them. Of course I'm being optimistic, but I think that the laws are going to become outmoded. Corporations can control things, but they can't control them absolutely 100% in every single possible conceivable way. For instance, a Negativland bootleg has just come out. It's a double-CD bootleg of our last tour. A guy walked in with a portable DAT recorder and recorded one of our shows. Now, we have two choices - frisk people at the door and put up signs that say "No cameras, no tape recorders or camcorders or DAT machines" and deal with people that way - which of course we would never do. It's kind of a hostile thing to do and given our philosophy how could we *ever* do that? My argument would be that we're *not* being ripped off. People are free to do what they want. If we didn't want people to record it then we shouldn't even play live. We should just stay home and play for our friends in our bedroom *(Laughs)*. So, anyway, you've got all these ways of digitally reproducing and transmitting information. More and more ways all the time. You've got these giant media corporations, the cable companies, the telephone companies, the government - they all want to control this and profit from it. And the next decade is going to be very interesting, because I think the new technology could be the undoing of all these powerful forces.

PJ: How so?

MH: Let's skip ahead 50 years from now. I think we're gonna look back at the last half of this century and see that there was this temporary, artificial boom period where a small number of people got to make huge profits from the sale and control of information and intellectual property. But at the end of the 20th century everything changed. As everything became digitized it became harder and harder to make the same amount of money they used to make. It's like the playing field got leveled out by the technology. Does that make sense?

PJ: The playing field got levelled out how? People will be able to bypass the corporations and the media because they have this new technology, the new -

MH: Yes. I hope so. All this new technology is gonna have a profound effect on these companies' ability to profit from information in the way they're used to and on governments ability to control the information that reaches its citizens.

PJ: So any positive change will be because of technological and not moral reasons?

MH: Well, unfortunately, trying to be moral and ethical doesn't get you very far in the United States today. The whole notion of control and distribution is changing underneath their feet. ●●●


NO!

Court's orders.[8]

(1) Contempt for the Copyright Act.

Defendants trumpet the motto "Copyright Infringement Is Your Best Entertainment Value" on the *title page* of the Magazine and in the December, 1992 Negativland Press Release. Declaration of Chris Grigg, Exhibit A, page 1; Declaration of Evan S. Cohen, Exhibit B, p. 2. Defendants believe that the Copyright Act, and copyright laws in general, should not be taken seriously, and, at best, serve as a mere stumbling block to the brand of artistic expression that defendants proffer.[9] It is obvious that defendants are oblivious to the purposes of the various Copyright Acts enacted over the centuries, *i.e.*, the encouragement of artistic ingenuity and expression by means of the *protection* of the works of authors. "The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." *Harper & Row*, 471 U.S. at 546.

(2) Contempt for this Court.

Defendants are so intent on disregarding and disparaging the laws of the United States that they have openly defied the Permanent Injunction of this Court in the Island suit, by openly offering to provide copies of the "U2" recording to anyone who wants one. This offer is set forth in the Magazine, the document that defendants claim they

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[8] The Nimmer treatise discusses the "propriety of the defendant's conduct" in the context of the "character of the use" analysis, *i.e.*, as adjunct to the first fair use factor analysis. NIMMER § 13.05[A], at pp. 13—102.50 to 13—102.53. Because the Court is not limited to consideration of only the four factors enumerated in § 107 of the Copyright Act, and because defendants' abhorrent conduct is so important to a thorough assessment of the fair use aspects of this case, Ginn views this element as important as the other four, and discusses it separately.

[9] The audio portion of the Magazine, Declaration of Chris Grigg, Exhibit B, contains, in essence, a 25-minute diatribe against the Copyright Act, in which the gist of the speech is that "Artists should be allowed to do whatever they want, including engaging in copyright infringement." In a pertinent quotation, the voice on the recording states that "Today, our entrenched copyright, publishing, and cultural property laws stand as a monument to private greed."

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distribute to advance their proclaimed lofty goal of enlightening the public with their view of the allegedly unfair practices of Ginn's company, SST Records.

On November 15, 1991, this Court prohibited defendants from selling or distributing any copies of the "U2" Single. That Order provides, in pertinent part, as follows:

> . . . Negativland, Chris Grigg, Mark Hosler, Don Joyce, and David Wills (the **"Settling Defendants"**), the proprietors, officers, directors, employees, and agents thereof, attorneys for said defendants and all those in privity with said defendants or acting in concert or participation with each of them are permanently restrained and enjoined from (1) *manufacturing, copying, marketing, promoting, advertising, distributing, selling,* or otherwise exploiting in vinyl, *audio cassette*, compact disc or any other format or medium, the sound recording known as **"U2 Negativland," or any derivative thereof**. . ."

Declaration of Chris Grigg, Exhibit A, p. 38 (emphasis added, boldface in original).

Defendants obviously care little about federal court orders. Ginn invites the Court to examine page 96 of the Magazine, in the left-hand column. The text[10] is as follows:

> NEGATIVLAND "U2" ALBUM WILL NOT BE CENSORED!!!! The Copyright Violation Squad, a division of the Aggressive School of Cultural Workers, Washington Chapter, is called into action once again as the satirical "U2" album by Negativland, loaded with strong social significance, is suppressed by the Entertainment-Military Establishment.

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[10] The page on which the text was printed states, at the top, "FOR IMMEDIATE RELEASE JUNE 1 1992," meaning that defendants released this document well after they became subject to the Injunctive Order.

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> It is obvious by now that the real motive behind banning recordings such as this is not the money these artists are supposedly keeping the "owners" of the work from "legally earning." It is the suppression of a very well-guarded secret: NO ONE can own the Electronic Environment; one can only own the means by which to produce it. The music industry sure would like you to believe they do (money talks. . .), but really, pay no attention to the man behind the curtain. Works of art that have been praised the world over are now being banned from existence. Nobody had the right to abolish ideas, and recorded music is only organized thoughts and sounds.
>
> **Therefore the Copyright Violation Squad makes available a cassette copy of the Negativland's "U2." To obtain your copy on high-quality tape, duplicated in real time from a digital master, send $7.00 IN CASH ONLY to:** CENSORED **Harrison NW, Suite 2101, Olympia WA 98502-2607. Any surplus after costs will be anonymously donated to Negativland for their Legal Defense Fund.**

Declaration of Chris Grigg, Exhibit A, p. 96 (boldface added).

In other words, *i.e.*, words stripped of sophomoric dogma, defendants are selling cassette copies of the "U2 Single" to all supporters of "artistic freedom" (and contempt of court) only if they care to send $7.00 "IN CASH ONLY" to Negativland.[11]

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[11] Plaintiff has not undertaken discovery on the issue of how much of the $7.00 is profit, as opposed to expense, or how many times defendants have acted in contempt by reproducing and distributing the tape. This is another question of fact. However, given the low cost of a common cassette tape and the cost of mailing it, is it is reasonable for this Court to conclude that defendants are reaping well over $5.00 each time they violate this Court's order.

Defendants' efforts in violating the Court's Order of November 15, 1991, *and* making a "fast buck" doing so, are utterly despicable.[12]

(3) This Court Should Deny the Defense of Fair Use on These Grounds.

At a minimum, fair use must be "fair." "Fair use presupposes 'good faith' and 'fair dealing.'" *Time Inc. v. Bernard Geis Associates*, 293 F. Supp. 130, 146 (S.D.N.Y. 1968). Since the primary goal of the Magazine was to make money, and, in addition, to make money from the contempt of this Court's Order regarding the "U2" Single, defendants are coming into this Court with unclean hands—not merely lightly soiled, but irremediably stained. "Also relevant to the 'character' of the use is 'the propriety of the defendant's conduct,'" *Harper & Row*, 471 U.S. at 562, citing NIMMER § 13.05[A], now at p. 13—102.51.

In contrast to a litigant who comes into court with a good faith assertion of the fair use doctrine, these defendants use the doctrine as a shield from liability, and, more accurately, prosecution, for their unlawful activities. This Court should not condone defendants' behavior by granting their motion.

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[12] The offer on page 96 of the Magazine is couched in a rather transparent fashion to give the reader the impression that the "Copyright Violation Squad," the entity that is supposedly undertaking the illegal and contemptuous tape duplication, is separate and apart from defendants. However, it is easy to see through such a puerile and thinly-veiled attempt at obfuscation, for two reasons: First, Mark Hosler resides in Olympia, Washington, the city to which the public is invited to send money, making a connection to Hosler quite likely. Second, this page appears in defendants' own Magazine, and, since defendants were solely responsible for its content, they are violating the Injunctive Order, because even in the remote chance that other the "Copyright Violation Squad" is comprised of individuals other than defendants, such individuals are obviously "acting in concert or participation with" defendants, by printing and publishing this "advertisement" in the Magazine.

57. Excerpts from the Deposition of Negativland's David Wills

On September 10, 1993 Negativland member David Wills was questioned in a deposition by SST's attorney, Evan Cohen. Also present was Negativland's attorney, Adam Belsky.

Q. Would you please state your name for the record.

A. David Hunter Wills. W-i-l-l-s.

Q. And what is your current business address?

A. (gives address), Martinez 94553.

Q. Have you ever had your deposition taken before?

A. No. First time.

Q. I'm going to give you a couple of our rules of taking depositions.

A. All right. I'll try to follow them.

Q. Everything you say today is being taken down stenographically by the court reporter. And sometime after this deposition is concluded, you'll be presented with a transcript of everything that's happened here today. You'll be given an opportunity to make any changes or corrections that you'd like to make to the transcript. You can change any answer. You can change a "yes" to a "no" if you'd like to, for instance. However,if you do so, I'll be able to comment on those changes at trial and it may adversely affect your credibility. So it's important for you to give your best testimony today.

A. All right. First time is best.

Q. Also, even though we're in the informal setting of a court reporting office today, you've been placed under oath and your testimony is the same as if you were before a judge and a jury in court.

A. All right. I understand.

Q. What is your present occupation?

A. Cable service technician for TCI Cablevision.

Q. Where is that company located?

A. Well, that other address I gave in Martinez.

Q. And how long have you been employed as --

A. Since September of 1978.

Q. Have you had any other occupations?

A. Before that I worked at ASI Market Research which is out of Los Angeles, but they had an office at General Electric CableVision in Walnut Creek. I did television surveys for NBC on the phone.

Q. Are you a musician?

A. No.

Q. What is your role in Negativland?

A. Kind of like a technical person. I guess that would be a good way to describe it.

Q. Well, what are some of your --

A. Fixing things for them. I've done that in the past.

Q. You have to wait until I finish the question.

A. Okay. I'm sorry.

Q. The court reporter can only take one person at a time.

A. Okay. I'll slow up. I'm sorry.

Q. What is it that you actually do when it comes to making records?

A. Usually I record found sound off radio around my house in Martinez just generally on cassette tape, and then I hand it over to the rest of the group and they work with it, or they've used my voice in various ways.

Q. Do you ever travel with Negativland when they go tour?

A. Let me make sure about that because it's been awhile. I can honestly say no, not once.

Q. How many Negativland projects have you been involved in?

A. Okay. Let me think for a minute. Thinking of different recordings. I'm just kind of speaking off the record here thinking how many I've worked on. Let me think for a minute.

MR. BELSKY: Can we go off the record for one minute?

(Discussion off the record.)

MR. BELSKY: Could you read the last question back, please?

(Record read by reporter.)

THE WITNESS: I'd say ten. Um-hum.

MR. COHEN: In what year did you first become involved with Negativland?

A. I believe it was in late 1979 or early 1980.

Q. And how did that come about?

A. I guess some of the people that I met worked at that ASI Market Reasearch, and we were all interested in sound recording. And it just became kind of a hobby that we did in our bedrooms for a while.

Q. What was the first thing that the group did as a group?

A. I guess we worked on our first recording called "Negativland". That's probably the best way to describe it. And then I remember the third album called "A Big Ten Eight Place." I'm trying to remember the title of the second record. That one is hard to remember.

Q. What was your involvement in the record called "U2", which I'm going to call for the purposes of this deposition the "U2" record? Do you know what I'm talking about?

A. Yes.

Q. What was your participation in that record on the creative side?

A. The voice alone.

Q. Did you provide any technological assistance?

A. I think I can safely say no. No.

Q. Do you remember when the "U2" record was created, that is, when your participation took place?

A. We started the project right -- I guess either right when my mother died or right after it. My mother had breast cancer -- and she did finally pass away in 1990 -- and that was taking up most of my time along with my job. And I can only say that it was like between 1990 and 1992 that the recording with my voice was made. It's hard for me to remember.

Q. When you say your voice was on the "U2" record, do you mean your spoken voice or your singing voice?

A. I think we would have to say spoken.

Q. Who wrote the words that you spoke on that record?

A. Well, I'm assuming members of U2, the band U2.

Q. You spoke the words "I Still Haven't Found What I'm Looking For"

A. Yes, that's correct.

Q. But did you speak any other words?

A. In addition to --

Q. -- to those specific words.

A. Yes.

Q. Were those words your words, or were they taken from the U2 rock band record?

A. Probably some of each, but mostly as the song appeared on the U2 album.

Q. That is by the Irish band?

A. Yes.

Q. Prior to the release of the "U2" record, did you have any conversations with the members of Negativland with regard to the likelihood of there being any legal problems concerning the cover art work of the "U2" record?

A. No. I guess I was very busy, again, dealing with my mother.

Q. You're aware of the lawsuit that was filed by Island Records after the release of the "U2" record?

A. I'm aware of it, but I don't fully understand it. I knew about its existence.

Q. Are you aware that you were named as a defendant at some point in that lawsuit?

A. Yes.

Q. Do you know why that is?

A. I'm assuming because I participated in the project. Something to that effect.

Q. After the lawsuit was filed by Island Records, did you have any conversations with anyone associated with Negativland with regard to that lawsuit?

A. Only brief encounters when I would visit them, and I didn't really understand what was happening, but I got the general idea, but that's about all. They would simply be telling me what was happening, and I would just accept it and let it go at that.

Q. Have you ever performed any services for Seeland Records?

MR. BELSKY: Objection.

THE WITNESS: That's good. I don't understand what that means.

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58. Negativland's Open Letter to 2 Live Crew's Attorneys

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

October 26, 1993

William C. Lane, Masselli & Lane, P.C., McLean, Virginia

Alan M. Turk, Esq., Nashville, Tennesee

Dear Gentlemen,

We are writing you again just to support and encourage the stand you are about to take before the Supreme Court in defense of 2 Live Crew's claim for fair use. We previously sent you some material relating to our own copyright infringement case involving U2 and Island Records. We have included a more recent statement of ours on Fair Use here, as well as a set of "Tenets of Free Appropriation" which Negativland applies to its own work. If any of these concepts interest you, feel free to use them.

We hope you realize that you are standing up for a right that is crucially important to many other artists out here who naturally gravitate toward a "direct referencing" of the everyday electronic environment which surrounds our public perceptions and pervades our personal spaces. The prevailing assumption that our culture and all its cultural artifacts should be privately controlled and locked away from any and all uses by the audience they are directed at is both undesirable and unworkable in this age of cheap and available reception and reproduction technology. Laws devised to protect the "ownership" of transmittable information are certainly out of date, if not obsolete, yet the law finds it difficult to admit that its prerogatives have been swept out from under it by technological advances. We hope the Justices have at least a smattering of McLuhan under their wigs.

A little history wouldn't hurt, either. The very idea of copying, which has always had a perfectly healthy reputation throughout the *entire* history of art, has only been highly criminalized in this century by the largely unquestioned assumptions of copyright legislation. Thus, we now have a music "industry", for example, in which the very *idea* of collage is a dangerous one, and artists do not have the "right" to decide what their own art will consist of. The fact that such cultural repression cannot (not to mention should not) be enforced is obvious to anyone who makes art and understands that artists will forever form their work out of whatever interests them, regardless of Corporate Culture's attempt to withhold those very public "properties" under their control.

Our biggest fear in the stand you are about to take is that the Court does *not* really understand the various art techniques which employ appropriation, or the motivations and historical justifications behind them. Art, of course, is based on precedent fully as much as law. Perhaps this tack would find a spark of recognition. We hope you are able to incorporate some sense of the history of the artistic process– the extent of copying, combining, simulating, and appropriating that has always been pursued by artists in all formats throughout all of art history, right up until this century's arbitrary attempt to stop it all at once. Coincidentally, just as these economically motivated prohibitions were put into law, 20th century art exploded into new styles expressing various impressions of the new, technologically based barrage of information and imagery produced by mass culture and mass communications: collage was invented in this century, as well as the notions of the "found object" and of "Pop Art" based on the public proliferation of mass produced commercial iconography. There are so many examples of the appropriation process at work in art history that it all but forms a tradition of "natural law".

Following photography, the latter half of this century has seen a proliferation of various capturing technologies, (copy machines, audio and video recorders, sampling synthesizers, etc.) which play right into the eager hands of this natural artistic inclination to reflect the world around the artist. Inevitably, these new potentials come into conflict with older (anachronistic) concepts of a privately owned mass culture. It seems to us that commercial

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interests have always had the upper hand in this conflict between business and art. We think your case is an important opportunity to present the whole idea that art ought to have a more equal footing in court when the real issue is not who is going to profit, but who should be determining what art might consist of. As things stand in precedent, attorneys and accountants are now given virtually free reign to suppress and censor a whole technique of creation utilizing sampling or appropriation, no matter how "original" the works using that technique might be.

There are two aspects we especially hope you will consider illuminating in your fair use defense. First, there is a big difference between the simple reselling of whole works (either "cover" versions or "bootlegging") and the creative use of fragments from existing works. We think this distinction is still generally blurred in the legal mind and barely acknowledged in the Fair Use Doctrine. For our part as appropriation artists, we believe that present copyright restrictions should only apply to "cover" versions (redoing an existing work with no attempt to reformulate the original score or lyrics *should* require license payments) and to "bootlegging" (reproducing entire works without permission from or compensation for the creator *should* be actionable). Bootlegging is not a "creative" act, produces nothing "new," and is done primarily for economic gain. "Cover" versions also involve the use of another's creation in its entirety, and no matter how creatively interpreted, the originator deserves recognition and compensation for providing the entire foundation for the new version. However, we don't believe the original creator should be able to deny permission to release any properly paid-for "cover" version, as that would (as it does) prevent "cover" parodies.

However, these perfectly reasonable uses of copyright regulations (which form the bulk of the original intent of copyright law) are now being equally applied to recent developments in the arts (unforeseen by the original copyright laws) in which the *fragmentary* use of existing work or works is incorporated into new and original creations. This is a distinctly new and different animal in which the whole becomes much more than the sum of its parts. A new and original creation results which usually bears no significant resemblance to the original works appropriated from. It presents neither economic nor creative competition to the original sources. It may well be unflattering to the original sources, but the right to be unflattering to subjects is a right that art has always had and we would do well to maintain it. In short, copyright law is now being subverted and misused to allow owners of work to simply prevent any unflattering use of that work, no matter how fragmentary. The present industry-convention requirement for prior approval to sample another's work means that any form of direct reference parody or critical commentary is routinely stifled.

Secondly, the other aspect of copyright law which sorely needs reinterpretation is the commonly accepted notion that Fair Use is negated if the work in question is created or distributed for profit. On one hand, the inclusion of the Fair Use Doctrine within copyright law seems to suggest that there is a recognition of the culturally valuable role of parody and critical commentary in our society. The Fair Use Doctrine apparently wants to make room for this. Yet, by routinely relegating these attitudes to a non-profit only status, it all but guarantees that unflattering, unauthorized parody and commentary remain a game for the independently wealthy only- those able to produce media (always expensive) without any return on their investment. This is not only unfair, but also quite unrealistic since, by their very nature, parody and criticism emerge most often from those outside the "establishment", and outside the "loops" of economic success and cultural complacency. These are the very people who most need the ability to derive whatever profit possible from their independent productions in order to be able to afford to create them in the first place. The present weight of interpretation which demands a non-profit status for Fair Use works actually works out to be an extremely effective form of censorship.

Whether or not any of this is useful to your thinking in this case, we certainly send our encouragement as you come up against these legal preconceptions. We do hope your stand will be broad enough to question some of the basic assumptions now in effect. Our ability to pursue a valuable, instructive, and entirely worthwhile creative technique is very much at stake in this case, and it is surely time for our legal system to seriously grapple with this now-unavoidable battle between art and commerce.

Best Wishes,
–Negativland

Enclosed: *Fair Use* essay
Negativland's Tenets of Free Appropriation

59. Negativland's "Final" Appeal to Chris Blackwell and Eric Levine

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

November 2, 1993

Mr. Chris Blackwell
Mr. Eric Levine
Island Records, London & New York

Dear Gentlemen,

Once again, we hope to gain your busy attention with this, our third attempt to evoke a reasonable response concerning the return of our record, *U2/Negativland*. We've again enclosed a copy of our original proposal. You are now the final hold-out in the whole Island/U2/Warner-Chappell/Polygram camp, and we hope you are now willing to join with your colleagues' responses so that we may pursue this issue with Mr. Kasem and relay a unified position from Island in this matter.

As you may know, in the August 29th edition of the *Sunday London Times*, in an article entitled *Over To U2*, Paul McGuinness says that he has no problem whatsoever with our record being re-released by us. He has also expressed this to us directly. In the same article, U2's The Edge is quoted as saying, "We (U2) have, by the way, given permission (to Negativland) to release the work with different artwork at their request, but unfortunately, Casey Kasem has refused to allow them to go ahead." This is somewhat disingenuous as long as you also refuse to agree. Mr. Kasem has refused us so far but we continue to exchange correspondence with him. (He has sent us *The Power of Positive Thinking* by Norman Vincent Peale and we have sent him *Hit Men* by Fredric Dannen.) However, he claims that he is unable to consider helping our record return to us because Island Records hasn't said that they are willing to return our record to us.

Don Biederman at Warner/Chappell informs us that, although U2's publishing has been transferred to Polygram, the music publishing administrator only acts at the direction of the originating publisher. Since the group U2 itself is the originating publisher and has already agreed to a re-release, that would seem to leave corporate Island now alone behind the stonewall.

Incidently, Mr. McGuinness also says in the above mentioned article, "We often get requests in from bands wanting to sample our work and we regularly grant it." If Mr. McGuinness is right, why not simply consider us to be another one of those bands now desiring to sample a piece of U2's work? Come on, gentlemen– everyone, even you, think our audio material is funny. Only Casey still hears some horrible threat in the record, and we're working diligently to broaden his sense of humor. But he doesn't have to focus on that as long as Island, through inaction, provides him with a more convenient excuse.

And speaking of "professional pride," we do understand how you have suffered our slings and arrows in the media. But then again, you may have noticed that those media are *all* on our side in this saga of misguided corporate control. We should think you would prefer to finally end your part in this saga on a positive note– which will be duly reported by us, not to mention a few independent film makers and non-fiction authors whose works on this whole story are forthcoming. It's amazing how interest in this hangs on, isn't it? May we gently suggest that this is probably because you have been, and still are, so predictably fulfilling a widespread preconception of what's wrong with modern corporate culture.

In order to emerge from this "March of Folly" (also a great book by Barbara Tuchman) with some final semblence of support for independent, free expression in the arts, we ask only that you provide us with a simple written statement stating your intent to grant us back our record if and when we gain Mr. Kasem's permission to re-release it. Casey may or may not ever change his mind, but Island and U2 would be able to say it's no longer their fault.

Jeez! How much sense do we have to make?

Yours Persistently,

–Negativland

Cc: Michael Goldberg/Rolling Stone; Richard Harrington/Washington Post; Brian Boyd/London Times/Irish Times; Jancee Dunn/Rolling Stone Random Notes; Chris Mundy/Rolling Stone; Craig Marks/Spin Magazine; Johann Kugelberg/Spin Magazine; Timothy Leary; Jeffrey Selman/Severson & Werson; John Parales/New York Times; Ann Powers/New York Times; Seanna Baruth/Gavin Report; Deborah Russell/Billboard; Chris Norris/Billboard; Paul McGuinness/Principle Management; U2 x 4

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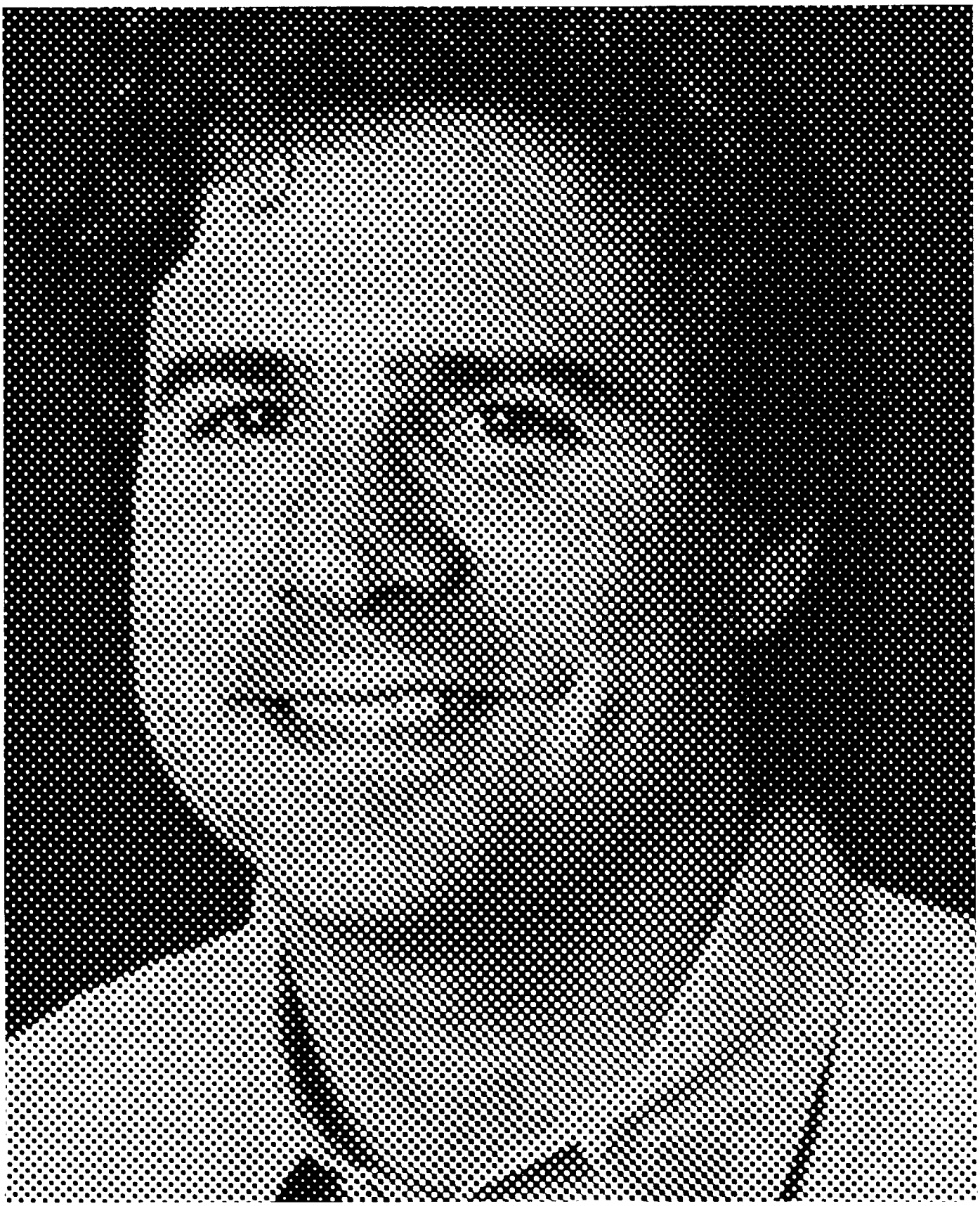

"I have no intention to speak with you on this matter."

In Fair Use Debate, Art Must Come First

■ BY NEGATIVLAND

As Duchamp pointed out many decades ago, the act of selection can be a form of inspiration as original and significant as any other. Throughout our various mass media, we now find many artists who work by "selecting" existing cultural material to collage with, to create with, and to comment upon. In general, this continues to be a method that both "serious" and "popular" arts incorporate. But is it theft? Do artists, for profit or not, have the right to "sample" freely from the already-"created" electronic environment that surrounds them?

The psychology of art has always favored fragmentary "theft" in a way that does not engender a "loss" to the owner. Call this "being influenced" if you want to sound legitimate. But some will say there is a big difference between stealing ideas, techniques, and styles that are not easily copyrighted, and stealing actual material that is easily copyrighted. However, aside from the copyright-deterrence factor prevalent throughout our law-bound art industries, we can find nothing intrinsically wrong with an artist deciding to incorporate existing art "samples" into their own work. The fact that we have economically motivated laws against it does not necessarily make it an undesirable artistic move.

All of music history has involved the fragmentary appropriation of existing works within "new" creations. Even material "theft" has a well-respected tradition in the arts, dating back to the Industrial Revolution. It first flowered in Cubist collages, then became blatant in Dada's found objects and concept of "detournment," and finally peaked in mid-Century with Pop Art's appropriation of mass-culture icons and mass-media imagery. Techniques of material appropriation bear a direct relationship to this century's *invention* of mass culture and the technologically-based barrage of information, imagery, and communication directed at the masses. Now, at the end of this century, it is in music where we find appropriation raging anew as a major creative method and legal controversy.

It's about time that the obvious aesthetic validity of appropriation begins to be raised in opposition to the assumed preeminence of historically recent copyright laws prohibiting the free reuse of cultural material. The prevailing assumption—that our culture, and all its cultural artifacts, should be privately controlled and locked away from any and all further creative uses by the audience they are directed at—is both undesirable and unworkable. Uninvited appropriation is inevitable when a population bombarded with electronic media meets the hardware that encourages people to capture those media. However, laws devised to protect the "ownership" of transmittable information have, for example, resulted in a music industry in which the very *idea* of collage is a dangerous one, and artists inspired by "direct reference" forms of creation do not have the "right" to decide what their own art will consist of. Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms?

The urge to make one thing out of other things is an entirely traditional, socially healthy, and artistically valued impulse that only recently has been criminalized in order to force private tolls on the practice, or else prohibit it to escape embarrassment. Artists continue to employ appropriation because it's just plain interesting, and no law can keep artists from being interesting. How many artistic prerogatives should we be willing to give up in order to maintain our owner-regulated culture? The directions artists want to take may sometimes be dangerous—that's the risk of democracy—but they certainly should not be dictated by what business wants to allow. Look it up in the dictionary: Art is not defined as a business! Is it a healthy state of affairs when laws of commerce get to lock in the boundaries of experimentation for artists, or is this a recipe for cultural stagnation?

'Today, the only solution for artists who appropriate other works rests with ... Fair Use.'

Negativland is a band of modern noisemakers who have employed appropriation in all their works. They have been sued twice.

Today, in a culture thoroughly colonized by private "property rights," the only solution for artists who appropriate other works rests with the legal concept of "Fair Use," which already exists within copyright law. The Fair Use statutes are intended to allow for free appropriation in certain cases of parody or commentary, and are the sole acknowledgement within copyright law of a possible need for artistic freedom and free speech. Unfortunately, the Fair Use Doctrine is now being interpreted conservatively and is being withheld from many "infringers." However, the beauty of Fair Use is that it is capable of overriding all the other restrictions.

Those of us who still value art over profit are now focusing on how to release the Fair Use Doctrine from its present commercial handcuffs. Both courts and Congress await the powerful suggestion that Fair Use issues are not about who is going to profit, but about who is going to determine what art might consist of. Until this adjustment in basic legal presumptions occurs, modern societies will find the corporate stranglehold on cultural "properties" continuously at war with the common sense and natural inclinations of their "user" populations.

Here is our main suggestion for updating the concept of Fair Use in order to accommodate the realities of recent technology, and to promote, rather than inhibit, "direct reference" art forms. Clear all restrictions—including requirements for payment and permission—on any practice of *fragmentary* appropriation. We would retain the present protections and fees for artists and their administrators only in uses of their *entire* works (cover versions) or for any form of usage at all by commercial advertisers. The test of whether a "fragment" is too close to the whole should be an artistic definition, not a commercial one. Namely: Is the material used superceded by a *new nature* of the usage itself—is the whole more than the sum of its parts? When faced with actual examples, this is not difficult to evaluate.

This one alteration in the Fair Use Doctrine would (for a change) serve to balance the will of commerce to monopolize its products with the socially desirable urge of artists to remix culture. If this occurred, the rest of copyright law might stay as it is (if that's what we want) and continue to apply in all cases of "whole" theft for commercial gain (bootlegging entire works).

The law *must* come to terms with the difference between artistic intent and economic intent. We believe that artistic freedom for all is more important to the health of society than the supplemental and extraneous incomes derived from private copyright tariffs that create a climate of art control and Art Police. No matter how valid the original intent of our copyright laws may have been, they are now clearly being subverted to censor resented works, to suppress the public's need to reuse and reshape information, and to garner purely opportunistic incomes. The U.S. Constitution clearly shows that the reason for copyright law was to promote a *public* good, not a private one. No one should be allowed to claim a private control over the creative process itself. Make no mistake: This is essentially a struggle of art against commerce, and ultimately about which one must make way for the other.

Billboard® Commentary

61. SST and Negativland Continue Their Settlement Negotiations

MARTIN COHEN
FRANK C. LUCKENBACHER*
EVAN S. COHEN
S. MARTIN KELETI**

*ALSO CERTIFIED PUBLIC ACCOUNTANT
**ALSO MEMBER DISTRICT OF COLUMBIA BAR

COHEN AND LUCKENBACHER
LAWYERS
740 NORTH LA BREA AVENUE
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LOS ANGELES, CALIFORNIA 90038-2338
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FAX (213) 938-6864

January 3, 1994

Adam C. Belsky, Esq.
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675

RE: *Ginn v. Joyce et al.*, U.S.D.C. (C.D. Cal.) Case No. CV-92 6692 DWW (JGx)

***VIA FACSIMILE TRANSMISSION:* (415) 677-7522**

Dear Adam:

Our client has reviewed the draft of the settlement letter dated December 13, 1993, and has several comments with regard to ¶ 5.a., dealing with the "Negativland Parody" issue. These comments are as follows:

Our client believes that the spirit of the settlement on this point was that Negativland would allow its philosophy regarding copyright law to govern the scope of what Greg Ginn may or may not do with Negativland works in the future, in the context of the right of "parody" to which we agreed. Negativland's philosophy on this matter has been published in several different media outlets, including the Negativland "U2" Magazine and the words spoken on the accompanying compact disc, and the "Commentary" piece in the December 25, 1993 issue of *Billboard Magazine*.

On the compact disc that was sold with the Negativland "U2" Magazine (in which, incidentally, Negativland makes an explicit dedication of that audio work to the public domain), Negativland states that there should be a "revision of the copyright laws;" that there should be an abolition of "artistic traffic laws;" and that copyright laws effect a "stranglehold on the reuse of culture." The copyright law should be revised, according to Negativland, to "only prohibit straight-ahead bootlegging of entire works," and that there should be complete freedom to use "partial" or "fragmented" sections of works. The definition of what Negativland considers to be a "fragment" of a work is quite liberal, moreover: they state that one should be able to use *anything* that is less than a "complete, self-contained creation of another."[1] Negativland claims that artists need to be protected from

[1] For instance, Negativland proposes (at 13:45 of the CD) that if one wanted to use the song of another in a film, no synchronization license or other permission would be necessary if the use were *anything* less than the totality of the original, or, as your clients put it, "*the complete self-contained creation of another.*"

"opportunistic claims of ownership" by copyright proprietors.

On page 25 of the Negativland "U2" Magazine, Negativland states that "once something hits the airwaves, it is literally in the public domain." Your clients believe that "Bootlegging exact duplicates of another's product should be prosecuted, but [Negativland] see[s] no significant harm in anything else artists care to do with anything available to them in our 'free' marketplace."

In the *Billboard* article, Negativland suggests that the doctrine of Fair Use be expanded to "Clear all restrictions -- including requirements for payment and permission -- on any practice of *fragmentary* appropriation. . . The test of whether a 'fragment' is too close to the whole should be an artistic definition, and not a commercial one. Namely: Is the material used superseded by a *new nature* of the usage itself -- is the whole more than the sum of its parts?"

The restrictions that you have included in your draft letter do not comport with Negativland's own philosophy of what artist should be permitted to do with the works of another. Because Greg Ginn is indeed a recording artist, he should, if Negativland is willing to put its artistic and philosophical money where its mouth is, as it were, be allowed to practice under the same guidelines with regard to Negativland's works as Negativland so vociferously advances unto others.

Without wishing to detract from the generality of foregoing statements, I note that at two of the several ideas you have set forth in that particular paragraph of the settlement letter are particularly inconsistent with Negativland's stated philosophy. First, I do not remember agreeing to limit Mr. Ginn to "one parody" of Negativland's work. Mr. Ginn should be allowed to create new artistic works as often as he likes; there are no similar existing limits on Negativland's creativity. Second, the limit of "thirty seconds" is an artificial and technical limitation which is inconsistent with Negativland's policy of deciding, on an artistic level and on a case-by-case basis, what is a "fragment" and what is not.

In our settlement discussions, we did agree to place certain guidelines on the packaging of new works, that is, Mr. Ginn has the right to create phonorecord packaging of the same general concept as the *U2 Negativland* phonorecord, and we did discuss the point about the minimum size of Greg Ginn's name on any such phonorecord. Aside from these limitations, however, we ask that you redraft the paragraph in question to broadly incorporate the concepts that Negativland has stated to the public on numerous occasions.

Very truly yours,

COHEN AND LUCKENBACHER

By: EVAN S. COHEN

cc: Greg Ginn, SST Records

62. Negativland Writes Directly to Greg Ginn

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

January 5, 1994

To: Greg Ginn c/o SST Records
VIA FAX

Dear Greg

As you know, we have suggested that you outline the guidelines you wish to use in sampling our work to complete our settlement agreement. We are gratified that you wish to follow our own principles of free appropriation. It is difficult enough to spread these concepts within a music "industry" now controlled and operated by the profit motive. We anxiously await your contribution to this esthetic– we think you will find it fun.

Mr. Cohen's fax of January 3, 1994 shows a careful study of our various writings, and we acknowledge that the preliminary draft of our settlement agreement put restrictions on your future creative use of our work which were inconsistent with those writings. So let us now state clearly that you are free to do whatever you heart desires with our recorded works, short of bootlegging them. We do want you to set down your self-determined parameters for sampling our work so that we can be assured that you do, indeed, understand the guidelines we espouse for such work. As Mr. Cohen's letter points out so clearly, it is all too problematic to attempt to establish any specific time limit for "fragmentary" sampling, short of the entire work. There are too many potentially creative uses for larger sampling blocks to restrict all those avenues altogether. Personally, we find it becomes increasingly difficult to maintain one's own esthetic thrust and originality in a piece when surrounded by too much of someone else's work, but we would not suppose it to be impossible.

In presenting the untried and radical concept of free sampling to the public, it is important to actually try it out in the hands of the widest possible range of practitioners. This is where the realities of both creative innovation and abuse will come to light. At this point in the development of this idea, we give the benefit of the doubt to artistic imagination. We encourage the courts to begin to realistically determine the difference between usages which only exploit the economic potential of the subjects used (bootlegging), and usages which re-form appropriated material to create something new. We're also working for a liberalization of the Fair Use Doctrine in copyright law so that it also gives the benefit of the doubt to any creative use, regardless of whether or not it is a parody. We welcome your attempt and all attempts to validate this way of using the world around you to inform your work. The proof is in the pudding.

It is unfortunate that what you want to do is technically illegal. Perhaps this free appropriation by mutual agreement is a route which could be followed by others, thereby allowing them to create a whole range of "direct reference" works which would not be risked otherwise. We believe that public opinion shifts dramatically on the basis of experience, not on theory. We need many more concrete examples of what free appropriation wants to do in order to clarify the artistic and cultural value of doing it to a population thoroughly entranced by the "need" for owner control over cultural artifacts. We never thought it would come to this, but now we welcome you as an ally in our ongoing struggle to shift a cultural paradigm. By the way, if this is really what you want to do as a form of creative expression, why did you sue us for doing it??

–Negativland

cc: Evan Cohen, Cohen & Luckenbacher; Adam Belsky, Morrison & Foerster San Francisco

1970 MONUMENT BOULEVARD #E-10 CONCORD CA 94520 510-1420-04689 FAX

Sampling Without Permission Is Theft

■ BY ANDRIAN ADAMS and PAUL McKIBBINS

A chill crawled up our spines upon reading the Commentary on fair use by self-described "noisemakers" Negativland (Billboard, Dec. 25, 1993).

Through a series of wildly specious arguments, Negativland seeks to promote the idea that they should be able—through the technique of "sampling"—to use others' creative and interpretive work for their own commercial gain without the inconvenience of payment or permission. To those who put in the time, energy, creative effort, and money necessary to create their music in its original form, this is intellectual and physical theft.

'This is not a struggle of art against commerce'

Andrian Adams is executive VP of Seymour Glass Songs/ EMI. Paul McKibbins is director of publishing for Rilting Music Inc.

The Supreme Court is considering the definitions of "fair use" and "parody" as they apply to the 2 Live Crew's use of the Acuff-Rose-owned song "Oh, Pretty Woman" on their album "As Clean As They Wanna Be." If the Court rules in favor of the publishers, some argue that it could have a dampening effect on other artists that employ parody (Billboard, Nov. 20, 1993). The ruling is expected this spring, and the case has spurred some artists, like Negativland, to call for dramatic alteration of the Copyright Act.

Negativland's position—"We believe that artistic freedom for all is more important to the health of society than the supplemental and extraneous incomes derived from private copyright tariffs"—actually negates the whole concept of music as a business. In Negativland's world, "art" and commerce are completely distinct entities. However, in our world of realism and logic, there is no distinction between art and commerce once the art is offered for sale. To insist otherwise is naive.

We feel compelled to address the other sides of the sampling issue. However, before we clean up the minefield of negativism and reseed it with positivism, let us state our view on sampling: If you use copyright-protected music for commercial gain, you *must* pay. Period.

In very practical terms—in fact, the Constitution guarantees it—intellectual property is no different than physical property regarding ownership. Just as one cannot take another's car without permission, one cannot take or use another's copyrighted creation without permission. Taking this one step further, no one, except a thief, would take another person's car and sell it without the proper, formal, legal arrangements. But this is exactly what happens when an artist appropriates a musical fragment and then profits from its use and sale. It's taking without permission.

Although Negativland justifies "fragmentary theft" (read: sampling) as an inescapable part of the artistic process, they defend this view *vis à vis* music with a historical reference linking Cubist collages to Dada and, finally, to Pop Art's use of mass-culture icons, i.e., Andy Warhol's Campbell's Soup can. Historical borrowing, says Negativland, supersedes modern copyright law.

But beyond the issue of art as commerce also lie the intrinsic moral and ethical responsibilities that come with the privilege of participating in a free-market system. In more colloquial terms, "doing the right thing."

With regard to music, the "right thing" is for users to pay the people who own the property, i.e., the copyright holders. In a civilized society, the rule of law, through legislation, rightfully plays an important role in codifying moral and ethical behavior. It also dictates the practical elements of the free market: The law defines who gets what and who has "the right to copy." Without laws to help guide a nation's citizens, there would be anarchy, although this seems to be the direction in which Negativland wants our nation to head.

Interestingly, Negativland claims that our "owner-regulated culture" prevents artists from partaking in their instinctive "urge" to create musical "collages" should they so desire. Furthermore, according to Negativland, "uninvited appropriation is inevitable" since our population is "bombarded with electronic media."

If the real issue is only that artists have the right to sample, we completely agree with Negativland's, and their "artist" friends', desire to sample. You may sample *anything*, as long as it is *not* for commercial gain. Since Negativland values "art over profit" and embraces a definition that "art is not a business," why should they care about selling their creations? Therefore, the point is moot. Sample away!

While determined to justify the appropriation of others' creative sweat, Negativland devises a bizarre interpretation of the "Fair Use" statute contained in current copyright law, which allows for free appropriation in instances that include parody, education, and commentary. Negativland benignly views these exceptions as a window for an "artistic freedom" and "free speech" interpretation of the Fair Use statute that would allow stealing for personal gain.

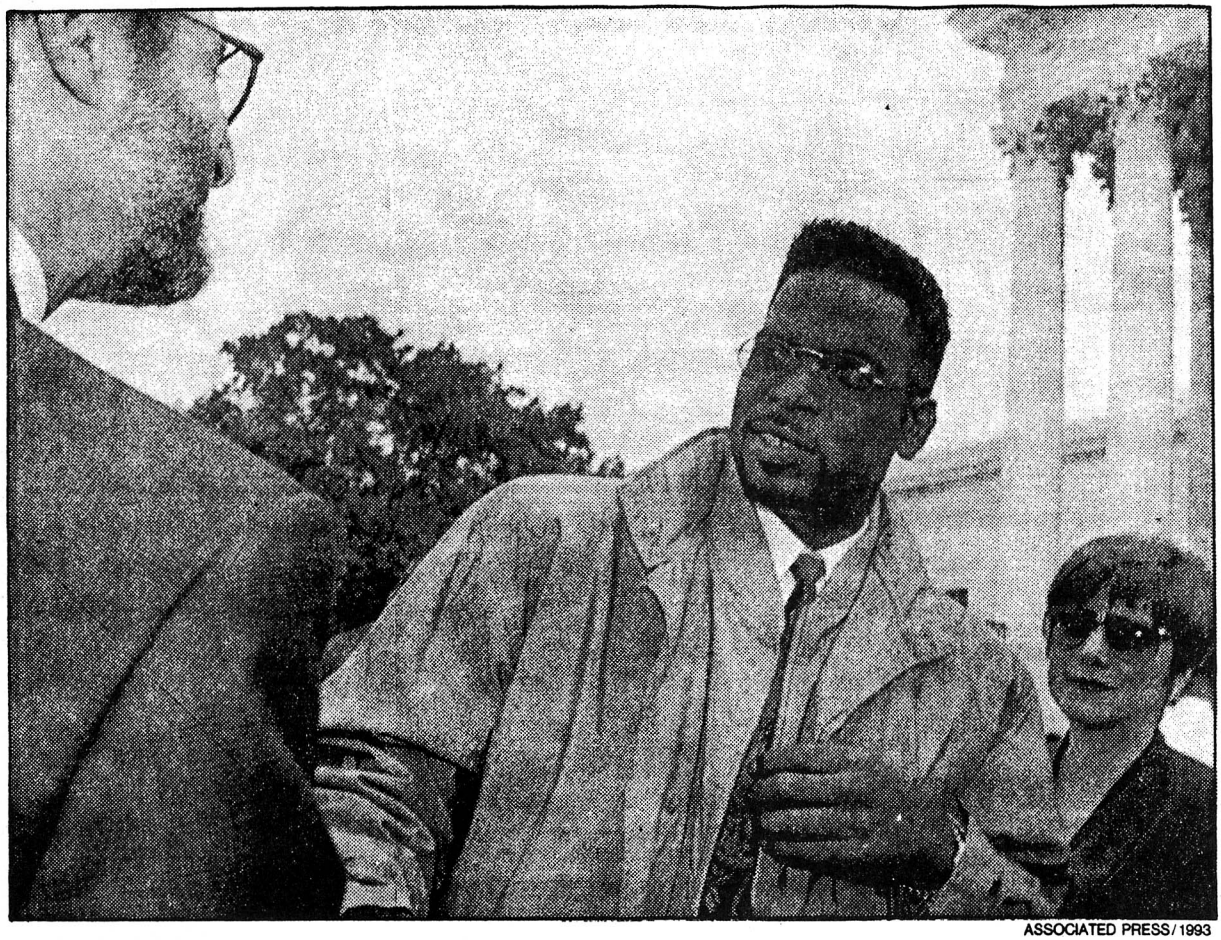
We believe that Negativland's position that "the private ownership of mass culture is a contradiction in terms" is nonsense. Mass culture is made up of an infinite number of distinct parts. It's the protection of those parts—that is, the copyrights—that continually stimulates creators to work in the arts. Without the stimulus of financial gain, how will artists survive? This brings us back to the idea of laws, morals, and ethical values.

While it is unlikely that Negativland's ideas will ever be implemented by Congress or the courts, we in the music business must be vigilant in protecting the copyrights we control. It is sad that there are growing numbers of Negativlands in our midst, people who want to steal from us in the name of "art." Like Negativland, these people want to "clear all restrictions—including payment and permission—on any practice of fragmentary appropriation." Whether it's one James Brown shout or the whole "hook" of a song, Negativland wants the right to have it in *their* music without paying the rightful owners of that music.

Make no mistake. This is not a struggle of art against commerce. It is about honest, hard-working people being compensated for the music they create and rightfully own.

Billboard® Commentary

64. U.S. Supreme Court Decides the 2 Live Crew Case



ASSOCIATED PRESS/1993

Luther Campbell, *center, thanks his attorney, Bruce Rogow, after Supreme Court hearing in November.*

High court ruling makes it easier to parody for profit

By **AARON EPSTEIN,** Knight-Ridder News Service

WASHINGTON — Comedians, musicians and satirists who use copyrighted works to poke fun at their targets won a major victory yesterday in the U.S. Supreme Court.

The justices, ruling unanimously in a dispute over the rap group 2 Live Crew's crude version of the rock classic "Oh, Pretty Woman," declared for the first time that unauthorized commercial parodies may be protected from penalties for copyright infringement.

"This is a very important victory for 'Saturday Night Live,' the Capitol Steps, Mark Russell, *Mad* magazine, the *Harvard Lampoon* and many others who make their living through the commercial use of parody," said Alan Mark Turk, a lawyer in Nashville, Tenn., who represented 2 Live Crew before the Supreme Court.

"Had we lost, they would have had to stop or modify what they do," Turk said. "The court, in effect, recognized parody as a valid form of social comment and criticism."

The Capitol Steps, a musical comedy group in Washington, and Russell are political satirists who often parody popular songs to lampoon figures in the news.

In the copyrighted song at the heart of the Supreme Court case, written 30 year ago by Roy Orbison and William Dees, the singer describes a "pretty woman walkin' down the street," expresses disappointment at being rebuffed by her and later rejoices when she seems to change her mind.

In 1989, Luther Campbell, leader of 2 Live Crew, used Orbison's music and the... altered it, converting the original romantic portrait of womanhood into depictions of repugnant females.

Among the revised lyrics: "Big hairy woman, you need to shave that stuff" and "Two timin woman, now I know the baby ain't mine."

Justice David H. Souter, writing the court decision, said the 2 Live Crew version could "be taken as a comment on the naivete of the original . . . as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies."

In Miami, Campbell hailed the ruling. "I'm very happy about this," Campbell said. "It's, like, a relief because everybody in the record and comedy industries who does parodies was sitting on hold. As a black man in this country, I felt that the system never worked for me. Now I really feel it does, if we fight and go to court."

But Ralph Peer II, chief executive officer of peermusic, a San Francisco-based publisher of 250,000 songs, said he was worried "that courts will take this to mean any changes in a song or any other work of art will be taken to be a parody entitled to protection."

In its decision, the court decisively overturned a federal appeal panel's blanket conclusion that "every commercial use of copyrighted material" is presumed to be "an unfair exploitation" of copyrighted work.

Souter said each claim of copyright infringement must be judged on its own merits.

The copyright holder, Acuff-Rose Music Inc. of Nashville, refused 2 Live Crew's request to use the song for a fee. But the parody was sandwiched between "Me So Horny" and "My Seven Bizzos" on 2 Live Crew's 1989 album, "As Clean As They Wanna Be."

In 1990, after nearly a quarter of a million copies were sold, Acuff-Rose sued for copyright infringement. A federal judge in Nashville, Joseph A. Wiseman, dismissed the case. But the 6th U.S. Circuit Court of Appeals, which includes Tennessee, Kentucky, Ohio and Michigan, reinstated it. The case goes back to Wiseman for a new evaluation.

The major purpose of issuing copyrights is to spur the creative activity of writers, composers and other artists by giving them exclusive control over their material for a limited period.

There is an exemption, however, for "fair use" of the material for publicly beneficial purposes, such as criticism, comment, news reporting, scholarship, teaching and research.

There is no explicit mention of parody in the law, however. The Supreme Court had never addressed the issue, although lower courts have considered numerous song parodies in the context of fair use.

The New York Times News Service contributed to this story.

65. Negativland Responds to Counter-Commentary

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

March 9, 1994

Billboard Magazine
Attn: Letters to the Editor

In answer to Mr. Adams' and Mr. McKibbins Commentary of March 5, '93: We hope they get a copy (excuse the expression) of the 2 Live Crew Supreme Court decision (not just the news reports) to acquaint themselves with the actual degree to which that decision follows our suggestion that artistic rights should outweigh copyrights when the usage is fragmentary and the fragments are transformed. The legally misinformed and economically self-serving position of these two music publishing executives, and the thousands of people who think, talk, act, and misunderstand the law like them, is in direct contradiction to the legislative history of the Copyright Act, its' case law, and now, to the holdings of the Supreme Court. Please, talk to a lawyer you haven't paid to be on your side about the simple, undeniable fact that copyright law provides an owner with an exclusive *but limited* license, and how those limits were intended to, of all things, *encourage the creation of new works.*

Adams and McKibbins present us with so many instances of helplessly blinkered commercial-think that rehabilitation seems impossible, but let's just dwell on one that's fun: Sampling music is no different than stealing cars. Well, not necessarily! Suppose we went down to Radio Shack and bought a car copier. Then we copied your car as it drove by our house. *You still have your car.* Then we took the right front fender off that copy of your car and used it as the left rear fender on our own car– which is being constructed out of lots of copied parts from many random and anonymous cars that drive by our house. Everybody thinks our hybrid car looks cool, like nothing they've ever seen, (which is interesting since it's made out of lots of things they've seen in mass produced cars) so we sell it in order to survive, and to be able to devote ourselves to building more, and we become hybrid car artists. The whole enterprise, however, would be economically impossible for us to begin or continue if we had to somehow find all those car owners that drove by our house and then pay them all for those copied parts. The end of hybrid copy cars. Now there's a world of "realism and logic" for you, where the only cars are mass produced cars. And thank God for Corporate Music.

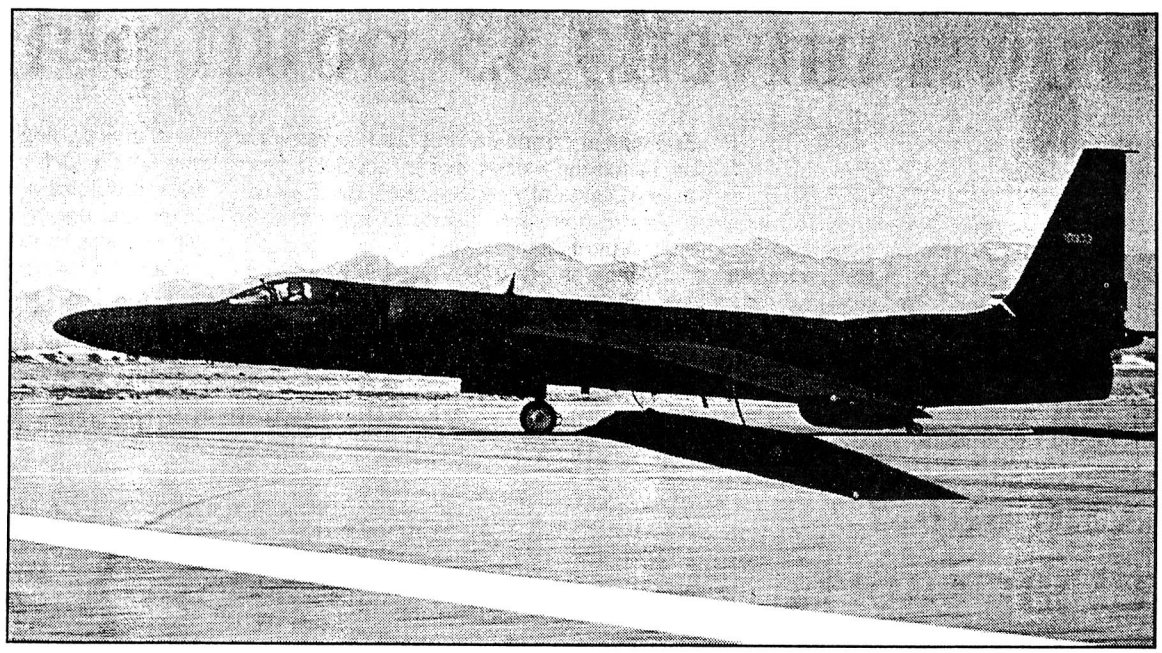
Mechanically Yours,

–Negativland

1920 MONUMENT BOULEVARD #E-U CONCORD CA 94520 510-1420-10469 FAX

Contra Costa Times

Tuesday, December 14, 1993



Associated Press

THIS U-2 SPY PLANE is similar to the one that crashed on takeoff at Beale Air Force Base on Monday. The plane has a range of more than 4,000 miles and can fly above 70,000 feet.

Pilot dies in spy plane crash

By JOHN HOWARD
Associated Press

BEALE AIR FORCE BASE, — A U-2 spy plane crashed on takeoff Monday afternoon at Beale Air Force Base near Marysville. The pilot, who ejected from the plane, was killed.

Air Force officials said Capt. Richard Schneider, 32, was pronounced dead at 2:15 p.m., about 35 minutes after the crash.

Schneider, an 11-year-veteran of the Air Force, was on a training mission at the Yuba County air base.

"He began his takeoff, he took off. The individual was able to eject," said Air Force spokesman Mike DiGiordano. The spokesman said officials do not know what caused the pilot to eject.

The aircraft exploded when it hit the ground about 200 yards from Beale's main runway, charring about one-third of an acre and scattering small pieces of debris.

Schneider is survived by a wife and five children. His hometown was not immediately known.

U.S. Air Force Capt. Nori LaRue said a board of officers would investigate the crash.

This is the fifth crash of a U-2 since 1984, the Air Force said. Most of the crashes have occurred on or shortly after takeoff.

The single-engine U-2 has a range of more than 4,000 miles. It can fly above 70,000 feet, higher than any other U.S. plane.

Because of the plane's large fuel capacity, there are no permanent landing gears. Wheeled struts fall off during take off and landings are made on two permanent wheels along the body of the jet, making both maneuvers difficult.

The planes have spied on global hotspots for more than four decades.

"Congress could not have intended such a rule."

66. Paul McGuinness: Still Not Looking For What He's Found

20/04 '94 15:30 ☎777276 PRINCIPLE MGMT 002

Principle Management Ltd.
30/32 Sir John Rogerson's Quay, Dublin 2, Ireland.
Telephone: (Dublin) 677 7330. Facsimile: (Dublin) 677 7276.
Please reply to above ☒

Principle Management
Limited & Incorporated

Principle Management Inc.
250 West 57th Street, Suite 1502, New York, NY10019
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☐ Please reply to above

FAX

To: Eric Levine From: Paul McGuinness

Subject: Negativland/U2

Date: 19th April 1994 Number of pages including this one: 1

Dear Eric,

The Negativland saga drags on...as far as U2 are concerned I am happy to confirm (again) that we have no objection to the re-release of the Negativland version of "I Still Haven't Found What I'm Looking For". If Negativland had taken the trouble to ask in the first place we would probably have said yes. Casey Casem, however is a different matter and I understand they do not yet have permission to use the recording of his voice that they have dropped into the track.

With best wishes,

Yours sincerely,

Paul McGuinness

cc: Jeffrey C. Selman
Chris Blackwell
Edge

67. Negativland Tries Again

"If you can't lick 'em, put 'em on with a big piece of tape."

May 24, 1994

Via FAX

Paul McGuinness, Principle Management
The Edge, c/o Principle Management

Dear Mr. McGuinness and Edge–

Thanks for forwarding your response to the letter that you, U2, and Island Records received from our attorney, Jeff Selman. Unfortunately, your brief statement *once again* avoids addressing our actual request. Won't you please stop and think about this for a moment?

Our request *is not* dependent on Casey Kasem's *present* position on the re-release of our single! We are simply requesting you and U2 to follow up on your public statements about this issue, and exert some real influence on Island to write a letter of intent to return our record to us if we can obtain Kasem's agreement *in the future*. Your responses continually sidestep the logic of this– we want this letter in order to assist us in *changing Casey's mind!*

This should be so obvious that we are naturally led to believe that you are playing dense because you really don't want to see this record re-released. Dwelling on Casey Kasem's intractibility allows you to preserve U2's image as powerless good guys in this situation...while Island takes the blameful role of corporate bad guys, absolving U2 of all responsibility for the continuing suppression of the record. In America, this is called playing "good cop/bad cop". If you really want this record suppressed forever, wouldn't it be more honest to just SAY IT? On the other hand, if you and the band are actually willing to buck the litigious conventions of your corporate copyright cohorts, and really believe in our right to make this record as you have said you do, why not follow through with a little action? Frankly, we don't believe we have much of a chance in changing Casey's mind; but again: *this is exactly why we want the letter.* What, exactly, have you got against our trying? And what, exactly, have you got to lose? Please tell us the truth.

If you don't want to come clean on this, those who read our forthcoming book or see the film being made about this whole adventure in bureaucratic culture fucking, will be left with the distinct impression that disingenuous double-speak and buck-passing are the real rules of the road you travel. Truly, it is more admirable to take a concrete stand on either side of an issue rather than attempt this endless, unresolved shirking of personal, pro-active commitment in favor of your faith in the labyrinthian system to never come to terms with anything. Are you really so interested in politics? We know you are *not* powerless to affect this situation. You are the biggest selling rock band on our little planet here. Is it you or Island who really believe our modest little alternative efforts actually *threaten* that? Casey *does* feel threatened, but why you? Why U2? Please take a stand for life and art and criticism outside the stone walls of corporate culture monopolism. You have been quoted to the effect that you're willing to do anything short of spending money to help us. Well, at this point your influence and advocacy are about the only tools we have to convince Island to write that letter. We know what you have said, what are you willing to *do?*

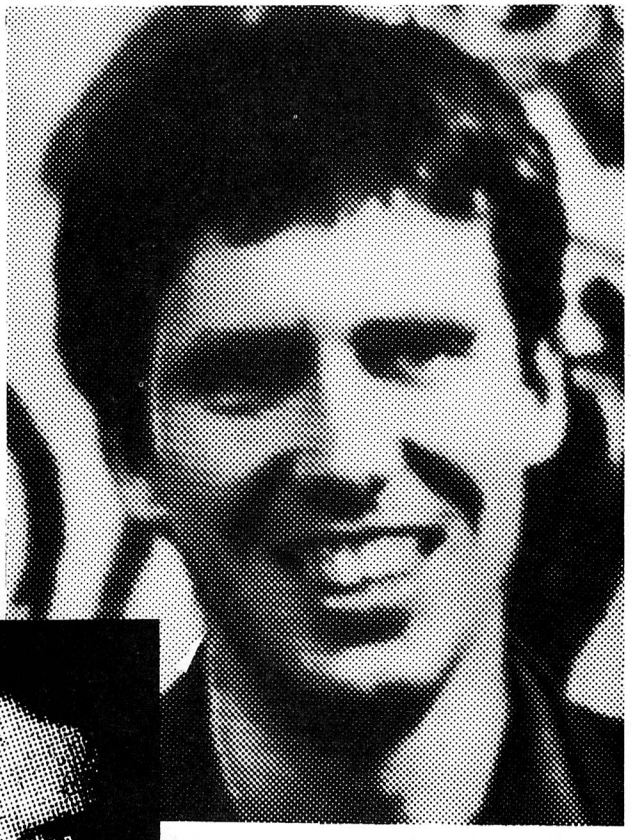
We are now in the final stages of completing our book, **Fair Use– The Story Of The Letter U And The Numeral 2**, which we expect to have out this summer. Please respond promptly and perhaps allow yourself and U2 to march out of the last chapter spinning positively...

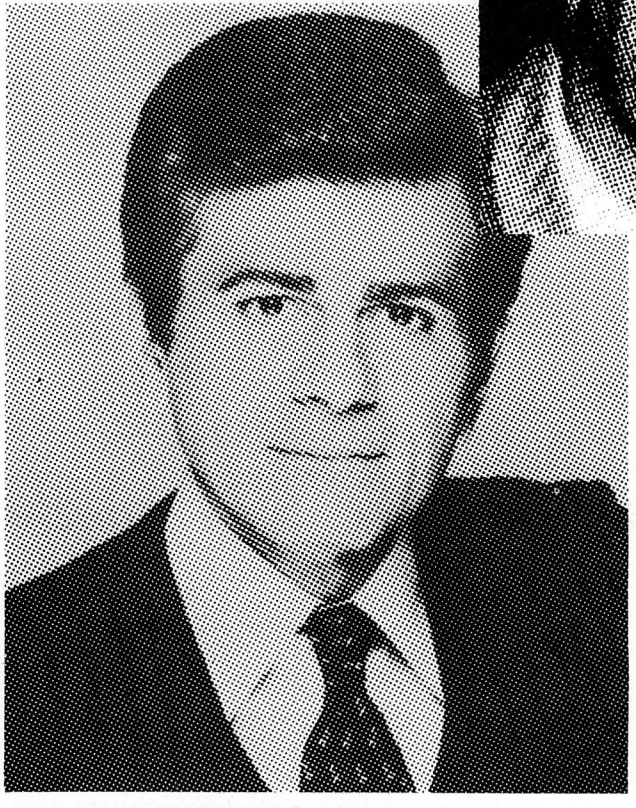
–Negativland

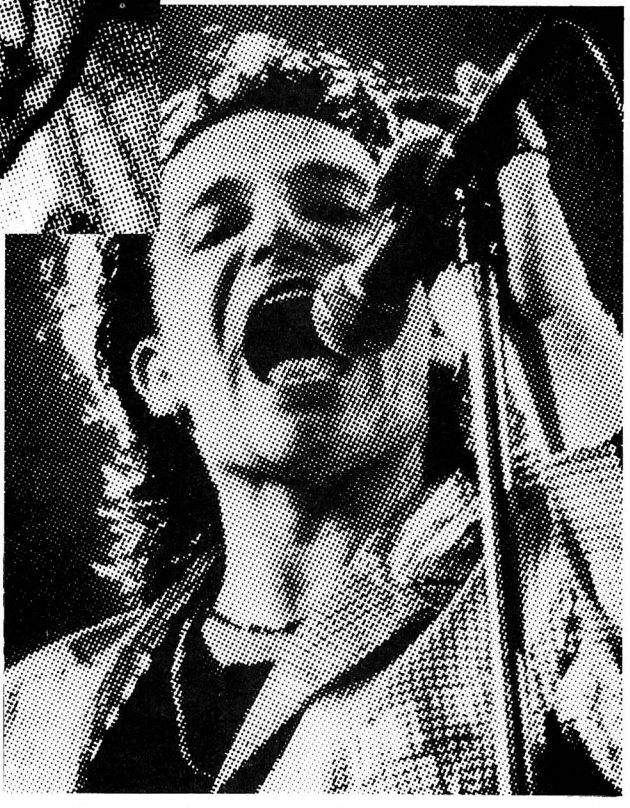
> *"To be told to go back and remix your single, redo your album, or that they don't like your artwork is something that U2 would never have tolerated– and never did. I hear so much now that I really wonder whether there hasn't been a general weakening of the resolve of the creative side of the business. I would certainly recommend to groups that they should stick by their guns."*
>
> –Paul McGuinness, Billboard Magazine, May 8, 1993

Cc: Larry Mullen Jr.; Bono; Adam Clayton; Jeff Selman

1920 MONUMENT BOULEVARD #E-U CONCORD CA 94520 510-420-0469 FAX







"Don't Let the Bastards Grind You Down"

68. Negativland and SST Reach Out-of-Court Settlement

Stucky and Stakke

ATTORNEYS AT LAW

"It's not a real law...

...it's just a lawsuit."

OF COUNSEL
GUS T. STUCKY
HAL O. STAKKE

May 26, 1994

Negativland
1920 Monument Blvd. MF-1
Concord CA 94520

Re: Summary of SST v. Negativland Settlement Terms

Dear Negativland,

Following the closure of the out-of-court settlement in this matter, I am writing at your request to summarize the outcome of your lawsuit and countersuit with Gregory Ginn, d/b/a SST Records. As you will recall, Ginn filed suit against each of you on November 10, 1992 and the firm of Morrison and Foerster agreed to represent Negativland on a pro bono basis on December 22, 1992 and filed your countersuit against Ginn on January 29, 1993.

The terms of the settlement agreement you reached fall into six major areas:

1. **"U2" Losses-- Ginn agrees to split the "U2" Losses with Negativland** (25% SST/75% Negativland).

   Before Ginn's lawsuit you offered to split Ginn's net costs of the "U2"/Island Lawsuit evenly. He sued you for 100% of a claimed $90,624.33, but could only demonstrate $41,317 in actual net costs in court. This amount is being split 25% SST/75% Negativland. You wind up paying $30,987.75, all of it to be deducted from your SST royalties. To date, SST has recovered all but about $3,000 of this amount by witholding your royalties without permission.

2. **Negativland Magazine-- Ginn agrees to drop his copyright infringement claims against "The Letter U and the Numeral 2" magazine. Negativland pays Ginn a royalty of 8.98 cents per copy on past and future sales of the magazine.**

   Ginn sued you for printing two of his press releases, a credit report on SST Records, his proposed indemnity agreement, a letter from his lawyer, and a bumper sticker. The court threw out the credit report and the bumper sticker claims and called the other claims "not very strong." You have agreed to pay Ginn a royalty of 8.98 cents per copy on all past and future sales of the magazine and have Ginn's permission to revise and publish the magazine again. At Ginn's insistence you gave him the opportunity to write 4 pages of his own for inclusion in the revised magazine. If you decide not to publish his pages, then the royalty rate for reprinting the other items quadruples.

3. **Record Contract Recission-- Ginn agrees to return 5 of Negativland's Releases on SST. Negativland agrees to allow SST to release "Live Stupid."**

   You countersued to rescind all 7 of your SST contracts and the disputed, unreleased "Willsaphone" and "Live Stupid" projects. Ginn wanted all of them but keeps only "Escape from Noise", "Helter Stupid", and "Guns". You get "Jam Con '84", "Pastor Dick", "The Weatherman", and "Dick Vaughn" returned to you. Ginn drops his claim for "The Willsaphone Stupid Show" and you agree to allow him to release "Live Stupid" and to provide SST with all tapes and artwork necessary for this to occur. Ginn also agrees to let you place an explanatory "disclaimer" on the outer packaging of the release to clarify the fact that the record is being delivered persuant to a settlement agreement, and that Negativland is no longer an SST act.

4. **Sampling and Reprinting-- Ginn demands that he be allowed to freely sample from any Negativland recordings and that he be allowed to print pages taken from your magazine "The Letter U and the Numeral 2" in a magazine of his own.**

   At Ginn's insistence the settlement agreement includes a provision which allows him to freely sample from any Negativland recordings (past, present, or future) in order to create parody sound collages based on your work. Ginn has stated that he intends to title the first such work "Negativland". He has also asked that he be allowed to reprint any number of pages taken from your magazine if he chooses to release his own magazine or book telling his side of the U2/Negativland/Island/SST story. As you have remarked, both of these settlement terms are bizarre since this is exactly what he sued you for in the first place.

5. **Royalty Rates-- The Court rules that SST is in violation of their contracts with Negativland regarding CD royalty rates.**

   In a Summary Judgement (September 2, 1992, USDC, Central District of California, case number CV 92-6692 DWW) the court ruled that SST's practice of paying you a royalty rate for sales of CDs that is based on the cheaper price of vinyl, resulting in underpayments of about 1/3 for CDs, is in violation of their contracts with you. This may be useful to other ex-SST bands, most of whom have similarly-worded contracts. Although we won this point hands-down, you have given up receiving the corrected CD royalties on past and future sales as an element in reaching this out-of-court settlement.

6. **Other Disputes.**

   SST agrees not to withold anything other than the "U2" charges from future royalty payments. SST returns the "Escape from Noise" booklet and bumper sticker negatives to you so you can control their production. SST modifies the "Escape from Noise" CD and cassette packaging to reflect the fact that the booklet and bumper sticker are now available from you, not SST. The "Christianity Is Stupid" T-shirt ad in "Helter Stupid" is modified to reflect the fact that the shirts are now available from you, not SST. SST and Negativland agree to a neutrally-worded joint press release announcing that the settlement has been reached. Finally, there is no gag agreement provision for either party (SST's attorney suggested one but you refused to agree to this).

And of course both sides agree to drop all claims and counterclaims, ending the lawsuit.

You have mentioned to me that in addition to the $31,000 of your royalties that SST is retaining, your own out-of-pocket expenses to date total to approximately $14,000, offset by donations of $5,000 from fans and supporters. Your total net loss from Island vs. SST and SST vs. Negativland therefore appears to be approximately $40,000. You have not been charged any legal fees by Morrison and Foerster, Severson and Werson, or myself, but you have paid for all of the incidental costs and expenses incurred by the attorneys in this matter (postage, phone bills, faxes, copying, filing fees, etc.) which came to a total of $10,557.29. My estimate is that if you had been billed for the time Adam Belsky, Harlan Mandel, Jeff Selman, myself, and other attorneys have spent on this matter, your total legal fees would have been in excess of $250,000.

Sincerely,

Hal Stakke
Attorney at Law

P.S. Did you realize that if the recent Supreme Court decision in the 2 Live Crew parody/copyright infringement case had occurred earlier, your "U2" recording would most likely have been perfectly legal?

SST RECORDS DROPS COPYRIGHT INFRINGEMENT SUIT AGAINST NEGATIVLAND IN OUT OF COURT SETTLEMENT

NEGATIVLAND PLANS FOR SUMMER RELEASE OF GREATLY EXPANDED VERSION OF THE MAGAZINE SST SUED TO STOP

DOCUMENTARY FILM MAKER PRODUCING FEATURE ON COPYRIGHT INFRINGEMENT AND NEGATIVLAND/U2/ISLAND RECORDS/ SST RECORDS SAGA

U2 SPEAKS OUT OF ONE SIDE OF A MOUTH WHILE ISLAND RECORDS SPEAKS OUT OF THE OTHER

NO LET-UP IN UFO ABDUCTIONS AS PLANET GOES ABOUT ITS BUSINESS

NEGATIVLAND/SEELAND RECORDS FAX 510-420-0469

FOR IMMEDIATE RELEASE

DATELINE: HOWLAND ISLAND, MAY 5, 1994

UNIVERSAL MEDIA NETWEB

HOWLAND ISLAND SPARKLES with tiny bubbles as it bathes in Pacific sunlight for the first time in several months. In their cubicles, all the residents of Howland are breathing easier and watching *Howland Happenings'* video replay of Sergio Caracas removing his ultra-modern diving gear minutes after his return from tightening the final titanium bolt on the island's hydro-matic lift mechanism. In the background of this video are three shadowy executives watching the bolt-tightening footage on a hand-held playback unit while calculating how much they can get for it from ABS who is about to begin production on a documentary about Howland, tentatively titled *Mr. Friday's Action Island.* At the top of Howland's control dome, Mr. Friday stands over his 3-meter fiberfax transceiver console absorbing the march of communications like a sponge.

NEW MSG AT 01:28:39 UT1 SRC 3 77

DEAR SIR,

HAVE RECEIVED NO NEW SHIPMENT OF "ART BEFORE PROFIT" POSTERS. OLD ONES GONE. N.Y. AND L.A. REPORT POSTERS TORN DOWN WITHIN HOURS OF BEING POSTED. MORE POSTER GUARDS NEEDED. WHAT ABOUT MY SUGGESTION OF USING THE HOMELESS? ALSO, GUARDS REQUEST MORE INSTRUCTION IN ORDER TO DEFEND POSTERS VERBALLY. CAN YOU PROVIDE FUNDS FOR LOGICIANS TO CONDUCT POSTER DEFENSE CLASSES? FIBERFAX ME IN LARAMIE, WYOMING.

BURT

NEW MSG AT 01:29:27 UT1 SRC 3 78

DEAR MR. FRIDAY,

OUR MECHANIC ON HOWLAND ATTEMPTED TO ORDER THE U-2 TIRE FROM LOCKHEED BUT THEY INFORM US THAT SKUNKWORKS RUBBER HANDLES THAT. WE HAVE GONE AHEAD AND ORDERED ONE. EXPECT DELIVERY IN 3 WEEKS.

JIM NUB
RESTORATION DEPT.
U2'S 'R' US INC.

NEW MSG AT 01:29:52 UT1 SRC 3 79

DEAR C. ELLIOT,

GLAD TO HEAR YOU'RE BACK ON TOP! CALL ME ABOUT THE "TIRE".

BUD "GOOSE" SPRUCE
CHIEF EXECUTOR
ESTATE OF HOWARD HUGHES
LAS VEGAS, NEVADA

A tiny beeping inside Mr. Friday's head interrupts his gaze and he reaches into his pocket with the only finger on his right hand to switch the transmission to the external speaker located just under his left earlobe. Mr. Friday's ear speaks. *"Hello, Sir. This is Stakke."* Mr. Friday gives up watching the fiberfax printout and rolls over to his top notch view of the Fridayland construction site as he speaks into the micro-microphone embedded in the bottom of his nose. *"Hello, Hal. What's up?"* He can hear his attorney shuffle some papers, clear his throat, and pause to let a large jet pass loudly over his office at the airport. *"Well, Sir, uh, now I'm speaking strictly out of your ear only, is that correct?"* Mr. Friday claps to kill the room recorder and says, *"Go ahead."* Hal Stakke switches to his speakerphone and begins reading, *"A settlement has been reached between Negativland and SST Records..."* Suddenly, Hal's office door is assaulted by shouting and pounding. He excuses himself from Mr. Friday's now acute attention and slowly opens the door with one foot against the bottom. Outside stands a large, one-eyed man who speaks in guttural tones with an indeterminate foreign accent. *"Are you Hal Stakke?" "Yes..." "I'm Caracas, working for Friday."* Behind him stand two airport security guards and a man in a suit. Caracas is perfectly calm. *"I'm afraid these gentlemen will not allow me to file my flight log." "What?"* says Hal. *"I just flew in from Nevada. I wish to file my log of the trip with the FAA here at the airport, which is my obligation and my right as a licensed pilot. This gentleman* (pointing at the suit) *refuses to accept my description of certain events which occured on this flight." "Like what?"* asks Hal. Caracas flips out a stack of Polaroids, each one clearly showing a fat silver disk of uncertain origin against blue skies and distant horizons. *"What is it?"* asks Hal. *"It's a UFO. These are it coming... and these are it going. In between, I was abducted in mid-air and then returned to my plane... in flight."* Hal begins to stutter, *"That's...a bit hard to believe..." "Apparently,"* offers Caracas with a distinct wink at Stakke. Then, with a turn towards his escorts, he continues. *"Of course, the aliens think so too; they count on that." "They're right,"* suggests the suit. *"Nevertheless,"* says Caracas now sinking into one of Hal Stakke's overstuffed office chairs, *"it's true. I also have everything on Super-8 and a few very interesting artifacts I was able to pocket while on their craft."* As Hal is attempting to say either *"What?"* or *"Where?"* Caracas continues, *"Mr. Friday has informed me that you will pursue and defend my right to file and make public the whole incident in detail. I'm holding a press conference over in the UMN hangar in three hours. You should accompany me for that. Until then, you are to research my right to file my own flight log in my own words no matter what it says. I'm apparently forced to remain here at the airport until an acceptable flight log is filed."* The suit nods. The door closes. The speaker speaks.

"So what about the Negativland settlement, Hal?" "Uh...Oh, yes, Mr. Friday... I have it right here... You're, uh, aware of this UFO thing?" Mr. Friday grunts an impatient acknowledgement. Hal leans toward Caracas, *"Let me see those pictures again..." "Don't worry, they're real,"* says Friday, *"You'll be coached on all the details before the press conference. What about the Negativland settlement?"* Hal Stakke moves to the papers on his desk but leaves his mind hovering in the middle of the room spinning with distraction. His professional role returns just in time to fill his opening mouth. *"Well, sir, I've reduced the settlement elements to six areas of concern..." "No, no,"* interrupts Friday, *"Never mind that. How does it scan for real-world refocusing?"* This terminology reactivates Hal's memory of all the memos from Howland relating to the need for dredging (1) humor, (2) aesthetic inspiration, or (3) cultural evolution out of this whole mundane legal morass. Hal kicks into the appropriate gear. *"Yes, sir, I see. I scan it this way. With regard to the settlement sampling agreement with Ginn, we are now in the interestingly ironic position of entertaining his demand to use Negativland's guidelines for free appropriation; the same ones he sued Negativland for using. His demand to appropriate from Negativland, of course, occasions a new opportunity to further delineate our guidelines for free appropriation, as well as indicating an apparent lack of any principled basis for his suit in the first place, since he ends up demanding the right to do exactly what he wanted to stop Negativland from doing. Ginn has met the enemy and, uh... he is them. This not only indicates that even our opponents see a telling value in commenting via appropriation, it also may produce a new, if unlikely, example of the technique at work, which only serves to bolster a general acceptance of free appropriation in the culture at large. So...uh, all this serves to boost the larger goal of providing a general prototype for... the specific revisions needed in U.S. copyright law... so that everyone can free associate, uh, I mean free appropriate... till they reach...art before profit..."* Mr. Friday responds in measured

tones, *"Hal, do I detect a slight disdain for our program here...?"* Hal gets a grip on his desk, *"Sorry, sir, no, not philosophically... I just... What about Caracas and the UFO's and the press conference? I don't have a power tie with me today..."* *"Forget the tie, it's simple as pie,"* says Friday, *"The press conference is step one in our worldwide revelation plan. Caracas will give a clear and detailed account of his abduction with Super-8 film of the whole thing. We've got planet-wide distribution for both live and tape-delayed broadcast. Next comes the Negativland CD, then a pre-announced, simultaneous appearance of extra-terrestial craft over all the capitols of the world. Hee, hee,"* chuckles Friday, *"they tell me they don't really know where all the capitols are these days, but no problem, there's only 189 of them. I'll make sure they get there and UMN will document them all. After that, we'll eventually need to demonstrate that these visitors are actually interdimensional entities and not from this universe as we know it. That's a tricky one to prove to everyone's satisfaction, especially since Interdimensional does not yet agree that humans are intellectually capable of absorbing that part of the revelation without causing significant damage to the strictly four-dimensional mode of human consciousness. I'm working with them on that, but for now, Hal, we're going to concentrate on actualizing one fictional cliche at a time. We are, of course, embarking on the most important evolution of human realization in all of human history, and it will undoubtedly be the subject of the 90's as well."*

Hal Stakke briefly mulls over what all this might possibly mean to the legal profession as he nervously begins scrolling through the 20 years of background files on Sergio Caracas which he has just brought up on his desktop library screen. The lines of text rising skyward relate the details of the Caracas Rebellion at the *Alice In Wonderland* Black Hole Tube, and his subsequent formation of the Quantum Church among permanent dwellers there. After the B.H.T. quantum mechanics were able to filter Caracas out of that tube, he shifted to the *Last Roundup* Black Hole Tube across town, moved in with some cave-dwelling Modocs there, re-established his Quantum Church among them, and, due to the fact that he understands micro black hole technology better than its creators, maintains his base of operations there to this day. Before getting anywhere near this far in the details, Hal has a question. *"Mr. Friday, do you think we can really trust Mr. Caracas? What if he has a separate deal with these... Interdimensionals?"* As he speaks, Hal's determined stare penetrates the slightly too large and reddish eye of Sergio Caracas. It doesn't flinch. *"He saved Howland,"* says Friday, (a little too quickly, thinks Hal) *"and even though Sergio has had his disagreements with me in the past, I have complete confidence in his ability and desire to initiate this revelation correctly."* *"The subject of the 90's,"* affirms Caracas with a smirk. Mr. Friday continues, *"By the way, Sergio, my contacts at Interdimensional do not think this will be the subject of the 90's; they're betting on copyright issues."* *"Really?"* exclaims Hal, seeing more of a role for himself in that direction. *"Yes,"* says Friday, *"but who knows how Interdimensional really thinks, or whether they even understand what a subject of the 90's is... Take my word for it, both of you, it's fruitless for employees to second guess either Interdimensional or the Retro-History Transinfiltration Project. Anyway, Hal, get with Caracas and prepare for the press conference... and I agree with your scan of the Negativland settlement."* Hal Stakke is beginning to understand how much there is to understand. He has no idea how wrong he is.

Mr. Friday switches his mike implant off and returns to the fiberfax console, which has just sounded its Pod-Com detection alarm. It shudders apprehensively, and begins its descrambled translation.

The slow, depressurizing trip down to Pod One flashes through Mr. Friday's memory banks. He sighs at the idea of returning so soon to the deep sea depths from which he has just risen. He wasn't even going to lower the island tonight. He suspects it is too soon for another conference on the revelation cover story; this must be about the Negativland settlement.

70. Greg Ginn's Statement (and Quiz) for Readers of This Book

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (310) 430-7687
FAX (310) 430-7286

"O.J."

As you may know the lawsuit filed against Negativland by SST has been settled. The story is far from over, however. As part of the settlement terms, SST has allowed Negativland to re-print copyrighted materials in exchange for a royalty to be paid SST on the sale of this booklet\CD. Also, I originally asked that I be allowed to place eight (8) pages of my own in the booklet to tell my side of the story. Negativland refused, instead offering me only four (4) pages of this hundred-odd-page booklet. In addition, they have a right to reject these pages and instead pay a higher royalty rate.

If you are reading this now obviously these pages weren't rejected. However, as I worked it became apparent that four (4) pages would not be enough to tell my side of the story and provide sufficient materials to back up my facts contradicting the myriad of inaccuracies put forth by Negativland in regard to myself and SST. I also knew that with the facts that I would be offering, I could not expect that Negativland would actually print this information which clearly exposes their deceit. Instead, I have decided that a thorough analysis\rebuttal covering all of the issues involved is in order. It would have been nice if Negativland allowed this to happen as part of their booklet, but it hardly surprised me that they weren't interested in allowing me to fully present my side. So, I am offering a revealing booklet of my own with accompanying CD to give you the complete and accurate story to date. This release dubbed "O.J." will mark the debut of a new entity "POSITIVLAND". "O.J." will be a revealing look behind the veil of hype--don't miss it. For your copy of POSITIVLAND'S "O.J." CD\Booklet send $12.00 postpaid (add $3.50 foreign) to: SST SUPERSTORE, P.O. BOX 1, LAWNDALE, CA 90260

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (310) 430-7687
FAX (310) 430-7286

FREE OFFER

Following is a multiple choice test constructed from just a few of the issues addressed in the soon to be released POSITIVLAND CD\Booklet, "O.J.".

Answer these questions correctly and receive a free prize. Send to O.J. test, SST RECORDS, P.O.Box 1, Lawndale, CA 90260

1. During part of his tenure in Negativland, Don Joyce has worked for a computer software company called Unison in Alameda, CA. What was his job title?

   A. Custodian
   B. Secretary
   C. Graphic Artist
   D. Personnel Dept. Manager

2. What kind of automobile does Negativland member Mark Hosler drive?

   A. Yugo
   B. Volvo
   C. Rolls Royce
   D. Are you kidding. He doesn't have that kind of money - he rides a bicycle.

3. What kind of work does Negativland participant David Wills do?

   A. Sells Grit newspaper door to door.
   B. Cable T.V. Serviceman for TCI Cable.
   C. Chauffeur for Governor Pete Wilson.
   D. None, he's homeless.

4. What was Greg Ginn's <u>total</u> income for 1989 (The year that the agreement was made to put out the U2 Negativland release on SST)?

   A. $0 (air alone is sufficient for this guy)

B. $5,150.00
C. $37,627.05
D. $87,529.00
E. $207,656.02

5. What is Mark Hosler's occupation aside from Negativland?

A. Sanitation Engineer
B. Nursery School Teacher (watch your kids!)
C. Executive Secretary
D. Mailman
E. Lounge Singer

6. How much does Negativland member Chris Grigg charge per hour to do graphics for computer games?

A. $7.00
B. $10.96
C. $17.50
D $30.00

7. Which one of the following job descriptions were not held by Chris Grigg in recent years?

A. Computer Graphics Designer
B. Apprentice Film Sound Editor
C. Consultant to the computer games industry for music and sound effects.
D. Director of music and sound for a computer games corporation called EPYX, Inc.
E. Advocate for the homeless

8. What was Greg Ginn's total income for 1990 (the year the U2 record was released and SST sued)?

A. $3,463.00
B. $15,287.00
C. $65,311.05
D. $821,956.00
E. $1,203,465.02

SST RECORDS
P.O. BOX 1, LAWNDALE, CA 90260 USA
PHONE (310) 430-7687
FAX (310) 430-7286

9. What type of automobile did Greg Ginn own in 1989 (when the agreement was made to put out the U2 Negativland release on SST)?

A. Volvo
B. Rolls Royce
C. Ford Fairlane
D. Camaro
E. None of the above. Ride the bus sucker!

10. To clear up the controversy regarding who is lying about the agreement to accept liability in the U2 lawsuit, Greg Ginn suggested that both he and Mark Hosler take a lie detector test. What was the outcome of this test, if any?

A. Hosler passed, Ginn failed
B. Ginn passed, Hosler failed
C. Hosler has refused to take the test.

11. Who is the whiniest\whimpiest singer in rock and roll?

A. Liz Phair
B. Poindexter Stewart
C. Evan Dando
D. Mark Hosler

If you don't know the answer to all of these questions, you need the new POSITIVLAND CD\Booklet "O.J."

Greg Ginn

LITTLE CORPORATE LABEL QUIZ

1. What makes large, "alternative" music labels different from large, corporate music labels?

A. Not much.
B. Very little.
C. Nothing.
D. They're even worse.

2. Why does SST incorporate into their "alternative" recording contracts all the same artist-soaking scams found in corporate music contracts, such as total and exclusive ownership of the artist's work in perpetuity, a 12% artist royalty on all records sold forever no matter when and how many times over the label's investment is recouped, still paying royalty rates based on the list price of vinyl when most sales are now CDs, and charging every label advance and almost every expenditure back to the artist, as if the label should expect to make profits on work they did not create by only spending from the creator's percentage of profits?

A. Unwillingness to walk their "alternative" talk.
B. That's how the game is played.
C. What's wrong with that?
D. Just shut up and play.

3. What is Greg Ginn's position concerning Negativland's principles advocating free appropriation?

A. He agrees with corporate music's refusal to allow any.
B. He has never thought about it.
C. He would like to do it but will not allow it to be done to him.
D. He doesn't think "principles" have anything to do with music.
E. He believes whatever his lawyer believes.

4. Why does Greg Ginn recount 8-year old, no longer factual, employment and automotive information when referring to members of Negativland?

A. He never updates his files.
B. He believes facts should not get in the way of self-serving misinformation.
C. He correctly trusts that such 'factoids" will never be checked out.
D. He believes no musician should ever be caught working, and that they are what they drive.
E. He believes the past is the present.

5. Which of the following ex-SST bands threatened Greg Ginn with a lawsuit if he continued to fail to pay them long overdue royalties?

A. Sonic Youth
B. Husker Dü
C. Meat Puppets
D. Bad Brains
E. All of the above.

6. Why did Greg Ginn sue ex-SST band The Meat Puppets?

A. To slap them for their uppity ways while sucking their back catalog for all he could.
B. To confirm his 'right" to own, control, and profit from their work even when they no longer worked for him (see above contract stipulations).
C. To "punish" them for leaving his stable for another label.
D. To give expensive lawyers more Volvos
E. To thank the band for making his label successful.

7. Why is Greg Ginn obsessed with the meaning of his own and other people's incomes rather than the meaning of the *actions* he and they pursue?

A. Incomes speak louder than actions.
B. Wages determine one's character.
C. The love of money is the root of all evil.
D. The love of evil is the root of all money.
E. Air is not sufficient for this guy.

8. Which of the following songs were written by Greg Ginn?

A. "Getting Even"
B. "Gimmie Gimmie Gimmie"
C. "Revenge"
D. "Don't Tell Me"
E. "I Won't Give In"
F. All of the above.

9. Approximately what did each side end up losing overall in the U2 and SST vs. Negativland lawsuits?

A. SST $25,000 / Negativland $40,000

10. What would each side have lost if SST had not sued Negativland, and instead accepted their request to split the U2 damages 50/50?

A. SST $22,000 / Negativland $22,000

11. Why?

A. Stupidity.
B. Folly.
C. Greed.
D. Vengefulness.
E. Venality.
F. Harassment.
G. Not responsible.
H. Situational ethics.
I. Business is business.
J. Don't remember.
K. Too much dope.
L. Don't remember.
M. Lawyer's advice.
N. Reptilian logic.
O. The arrogance of power.
P. Predatory tendencies
Q. Slam dancing
R. Why not?
SST. Conforms to the same knee-jerk bunch of exploitive assumptions practiced by the entire music industry in which the artist is seen to be an employee who should be grateful for the "job," eager to let the product manufacturer own the product, more than willing to pay for every aspect of production and marketing while receiving a permanently tiny fraction of the profits, and happy to quietly endure his or her helpless "place" in this boss/grunt relationship because the antique, robber baron, contractual traditions of this, one of the most corrupt industries in the whole sleezy world, continue to allow it.

72. Putting Words In U2's Mouth

28/05 '94 13:36 ☎777276 PRINCIPLE MGMT 001

Principle Management Ltd
30/32 Sir John Rogerson's Quay, Dublin 2, Ireland
Telephone (Dublin) 677 7330 Facsimile (Dublin) 677 7276
Please reply to above [X]

Principle Management
Limited Incorporated

Principle Management Inc.
250 West 57th Street, Suite 1502, New York, NY10019
Telephone (212) 765 2980/2/9, Facsimile: (212) 765 2372
[ ] Please reply to above

FAX

To: Negativland From: Paul McGuinness

Subject:

Date: 26th May 1994 Number of pages including this one: 1

Dear Negativland,

Without wishing to set any precedent for your putting words into my mouth I would to make the following invitation to you: You should draft the letter from me that would serve your purposes and if it's honest, appropriate and acceptable to me I will sign it on the condition that you stop writing to us.

Best wishes,

pp: Eileen Howard
Paul McGuinness.

cc: U2
Jeff Selman
Chris Blackwell
Eric Levine
David Hockman

73. U2 Finally Agrees

LETTER TO ISLAND:

Chris Blackwell, Eric Levine, Johnny Barbis
Island Records, London & New York

Gentlemen,

We ~~require~~ Island's signature on the enclosed Letter of Intent that Negativland have drafted at our request.

As we all know, Negativland refuse to go away. It is U2's position that their record should be returned to them, provided the cover is changed so as not to resemble a U2 release. In our contracts with Island we did not intend to preclude parodies such as "Negativland U2" (aside from the misleading cover). Due to Casey Kasem's notice that he intends to act against Island should such a transfer occur, however, the transfer would need to be made contingent upon Kasem's withdrawal of his threat to Island. To move towards returning the recording to the band– and to end the stream of letters, faxes and phone calls from Negativland and their supporters to all of us– we therefore ~~direct~~ you to join me, PolyGram Music, and Negativland in signing this letter of intent. Casey Kasem may feel he has grounds to move against a re-release of Negativland's record, but absent his threat to Island that's no concern to any of us.

Sincerely,
Paul McGuinness

Cc: Negativland

LETTER TO POLYGRAM:

Gentlemen,

We ~~require~~ PolyGram Music's signature on the enclosed Letter of Intent that Negativland have drafted at our request.

By now you may be aware of the situation between U2 and the American band Negativland, who were sued along with their record company in 1991 by Island Records and Warner-Chappell Music over their parody of U2's "I Still Haven't Found What I'm Looking For." In the settlement agreement, all rights in the record were assigned to Island and your predecessor as administrators of U2's publishing, Warner-Chappell. Ever since then, Negativland have been persistent in their requests to get their record back. In fact, they refuse to go away. It is U2's position that their record should be returned to them, provided the cover be changed so as not to resemble a U2 release. In our contracts with PolyGram we did not intend to preclude parodies such as "Negativland U2" (aside from the misleading cover). Due to a notice from Casey Kasem that he intends to act against Island should such a transfer occur, it would need to be made contingent upon Kasem's withdrawal of his threat to Island. To move towards returning the recording to the band– and to end the stream of letters, faxes and phone calls from Negativland and their supporters to all of us– we ~~direct~~ you to join me, Island Records, and Negativland in signing this letter of intent. If you have heard the record, you may think that Casey Kasem would feel he has grounds to move against a re-release of Negativland's record, but absent his threat to Island that's no concern to any of us.

Sincerely,
Paul McGuinness

Cc: Negativland

Letter of Intent

To Whom It May Concern,

1. Island Records, Inc. and PolyGram Music, Inc. are the present owners of all rights relating to the Negativland single known as *U2/Negativland - I Still Haven't Found What I'm Looking For* (a parody of U2's song *I Still Haven't Found What I'm Looking For*), pursuant to the settlement agreement in the lawsuit *Island Records et al. v. SST Records et al.* (United States District Court, Central District of California, case no. CV 91-4735 AAH(GHKx)), and pursuant to Warner-Chappell Music's transfer of all rights pertaining to the U2 song catalog to PolyGram Music.

2. Island Records, Inc. and PolyGram Music, Inc. wish to allow Negativland to re-release that single on Negativland's own Seeland label. However, Island is on notice from Casey Kasem that he intends to take legal action against Island in the event that the single is released again with Island's involvement, and Island has no desire to be sued by Casey Kasem.

3. Therefore, Island Records, Inc. and PolyGram Music, Inc. intend to license in a timely manner all necessary rights in and to the sound recordings comprising that single to Negativland, for the purpose of such re-release, only if both of the following conditions occur:

A. Island Records and PolyGram Music will not be obligated to license their rights in the single until and unless Casey Kasem expressly agrees in writing to hold Island Records harmless in the event of such a transfer, and until and unless Island Records independently verifies Casey Kasem's agreement; and

B. For the purpose of ensuring that the re-release of the *U2/Negativland* single by Negativland will not be construed by the public as a U2 release, no such re-release may occur without prior approval of all revised graphic artwork, labels, and packaging for the re-release by U2, Principle Management, and Island Records.

4. As consideration for the execution of this Letter of Intent by authorized legal representatives of Principle Management, Island Records, and PolyGram Music, Negativland hereby promises thereafter never again to contact U2, Principle Management, Island Records or PolyGram Music concerning this issue, except as necessary to implement the terms of this Letter of Intent.

5. This Letter of Intent may be executed in counterparts, and as so executed shall constitute one agreement binding on all parties.

For Negativland:

Mark Hosler, Partner
Dated 7/1/94

For U2 and Principle Management:

Paul McGuinness, Director
Dated 2nd 6/94

For PolyGram Music, Inc.:

Name
Title
Dated

For Island Records, Inc.:

Name
Title
Dated

Cc: U2x4
Jeff Selman, Severson & Werson

Principle Management Ltd.
30/32 Sir John Rogerson's Quay, Dublin 2, Ireland
Telephone: (Dublin) 677 7330. Facsimile: (Dublin) 677 7276.
Please reply to above ☒

Principle Management
Limited Incorporated

Principle Management Inc
250 West 57th Street, Suite 1502, New York, NY10019
Telephone: (212) 765 2330/2/9. Facsimile: (212) 765 2372
☐ Please reply to above

FAX

To: Negativland From: Paul McGuinness

Subject: The usual

Date: 29/6/94. Number of pages including this one: 4

Gentlemen,

I have now signed your letters for you with minor changes to make the requests less peremptory. As noted by me on your letter (28/6/94) I do not intend to do anything about following up. The Polygram person copied on this is David Hockman.

Goodnight!

P. McG.

cc 42 x 4.
Jeff Selman
Chris Blackwell
Eric Levine
David Hockman.
Johnny Rabbis

74. PolyGram Music Finally Agrees

PolyGram

POLYGRAM INTERNATIONAL
MUSIC PUBLISHING LIMITED
8 St James's Square
London SW1Y 4JU
Tel: 071 747 4000
Tlx: 263872
Fax: 071 747 4467

BY FAX

12th September 1994

Negativland,

Oakland,
CA 94618,
USA

Dear Negativland,

Following our recent telephone conversations, first of all please accept my apologies for not having got back to you sooner. I have now reviewed the situation and I am writing to you to confirm the position as we see it. I am not using the text of the "letter of intent" that you sent to Paul McGuinness because I prefer the following.

On the basis that permission is obtained from all other parties having an interest in the Negativland parody recording "I Still Haven't Found What I'm Looking For" (based on the U2 song of the same name) including but without limitation Casey Kasem and Island Records, we will not object to the release for sale to the public of the recording in question.

This situation is on the basis that we will licence 100% of the music publishing rights in the recording insofar as they derive from the U2 song and in accordance with all agreements now in place, including but without limitation the settlement of the law suit referred to by you when we spoke and that proper and normal licence agreements will be entered into at the appropriate time.

I hope this letter is sufficient for your present purposes and, of course, if you have any comments or questions, please don't hesitate to contact me.

Yours sincerely,

CRISPIN EVANS
Director of Legal & Business Affairs

75. Even Island Records Finally Agrees

SEP-27-1994 21:32 FROM ISLAND BUSINESS AFFAIRS TO 15104200469 P.02

ANDREW LEWIS
VICE PRESIDENT OF BUSINESS AFFAIRS

September 27, 1994

VIA FAX

Negativland

Oakland, CA 94618

Re: Negativeland - "I Still Haven't Found What I'm Looking For"

Dear Negativland:

Further to our conversation last week this is to confirm that Island Records, Inc. ("Island") has no objection to entering into a license with Negativeland whereby Negativeland will be entitled to release on its own Seeland label the Negativeland parody recording "I Still Haven't Found What I'm Looking For" provided that as a condition precedent of such license Negativeland has obtained the prior written consent of all other relevant parties, including Casey Kasem, and that Casey Kasem expressly agrees in writing (in a form acceptable to Island) that he forever waives any claim which he may have against Island arising from the license of rights to Negativeland.

Once this condition has been met Island is prepared to enter into an appropriate license with Negativeland on terms to be discussed. I should however mention that it is my understanding having spoken to Casey Kasem's attorney that his position as yet remains unchanged.

As we seem to have missed each other on the telephone I am sending you this fax in order to avoid any further delay and I therefore hope that it serves your present purposes. If, however, you would like to discuss this further please give me a call.

Yours Sincerely,

Andrew Lewis

76. So Long, It's Been Good To Know You

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

October 2, 1994

VIA FAX

To: U2 x 4 c/o Principle Management
Chris Blackwell @ Island Records
Paul McGuinness @ Principle Management
Hooman Majd @ Island Records
Andrew Lewis @ Island Records
David Hockman @ PolyGram Music
Crispin Evans @ PolyGram Music
Eric Levine @ Island Records

Gentlemen–

This fax is to confirm that we have now received all of your signed letters of agreement stating your intent to conditionally license the *U2/Negativland- I Still Haven't Found What I'm Looking For* composition and recordings to us for release on our own Seeland Records label.

We don't quite know what it was that finally brought all of you into agreement with our point of view in this matter, but we're thankful and glad that you finally did. It's unfortunate for us that it took three years of our effort to get us all to where we are now.

We hope that by now you are aware of the recent U. S. Supreme Court decision in the Acuff-Rose/2 Live Crew *Pretty Woman* case (a decision that would have made our *U2/Negativland* quite legal under the Court's expanded interpretation of the Fair Use clause of the Copyright Act), and that you will exercise more care and caution the next time you contemplate suing someone for the creative re-use of your material.

As for us, our next step in this saga is in sending yet another letter to Casey Kasem, a copy of which follows for your reference in case he contacts you.

Sincerely,

–Negativland

Cc: Jeff Selman @ Severson & Werson, San Francisco

77. Back To You, Casey!

negativland

"If you can't lick 'em, put 'em on with a big piece of tape."

September 28, 1994

VIA FAX AND U.S. MAIL

Dear Mr. Kasem,

We write to you once again, this time concerning the enclosed letters of intent which have recently been signed by U2, Island Records, and PolyGram Music Publishing. These are the combined parties now in possession of our *U2/Negativland* single. As we mentioned to you before, we are intent on regaining the right to re-release this record on our own Seeland label. As you will notice, the above parties are now agreeable to this, as long as you will agree to hold them blameless for returning the record to us. Therefore, we have enclosed a letter of intent for you to consider signing, simply saying that you will not take any legal action against U2, Island, or PolyGram if they return our record to us. In that letter we are making a distinction between your position with regard to Negativland and your position with regard to the other parties, so that you would remain free to sue Negativland at any time, as we are the only people responsible for this work. The signed agreement would be sent to Mr. Andrew Lewis at Island to confirm your position with regard to them.

We would, of course, also hope to get your concurrence on our re-release of the record.

We have spent a great deal of time, effort, and frustration in negotiating these agreements with U2, Island, and PolyGram and we are as surprised as you must be that we were finally able to achieve this major step towards retrieving our work. It seems that they, like everyone else, think the record is very funny and, after their initial knee-jerk litigation of it, are now willing to let it exist. We hope your somewhat deeper problem with it has softened with time and perspective, and that you might now be agreeable to letting us put the record out on our own micro-label, Seeland.

But if not, perhaps we can suggest an alternate form of release you can live with. We would gladly agree to release *U2/Negativland* as a mailorder record only. It would not be sent to distributors and it would not appear in any stores, but it would be available to anyone who orders it from us by mail. This would keep it in much lower profile with regard to your concerns, and a legally binding agreement along these lines would leave you free to litigate any abuse in the future. Please feel free to devise any alternative plan for re-release. We are open to suggestions.

Re-releasing the record will require new packaging to satisfy U2, Island, and PolyGram, and we would be happy to add a prominent acknowledgement of your assistance in getting the record back from Island, or your agreement to this re-release– or not to mention you at all, whatever you prefer. If you would care to write the liner notes for the re-release, we'd love it. If you would like a royalty percentage of sales, that too. And our offer to donate the profits to any cause you specify– in your name if that's what you would like– still stands.

Now that so much time has passed and we have finally arrived at this extremely difficult-to-reach plateau in our non-stop climb to re-release *U2/Negativland*, we hope your artistic instincts will find the generosity to let it happen, and that you will sign the enclosed letter of agreement.

–Negativland

Letter of Agreement

To Whom It May Concern,

I am informed that Island Records, Inc. and PolyGram Music, Inc. are the present owners of certain rights relating to the Negativland single known as *U2/Negativland - I Still Haven't Found What I'm Looking For.* I am further informed that Island Records and PolyGram Music now wish to allow Negativland to release that single on the group's own micro-label, Seeland, and consequently are willing to license those rights to Negativland (contingent upon certain conditions).

My attorneys have previously informed Island Records, Inc. of my opposition to any re-release of the *U2/Negativland - I Still Haven't Found What I'm Looking For* recordings, due to their unauthorized incorporation of recordings of my voice, and of my intent to take legal action against Island Records in the event of any re-release of the single with Island Records' involvement.

While reserving all rights and options to object to the re-release of these recordings in general, and to take legal action against Negativland and Seeland in particular, I have reconsidered my position in regard to Island Records. Therefore, I hereby agree to hold Island Records harmless in the event of such a transfer of rights relating to the *U2/Negativland - I Still Haven't Found What I'm Looking For* recordings for purposes of re-release on the Seeland label.

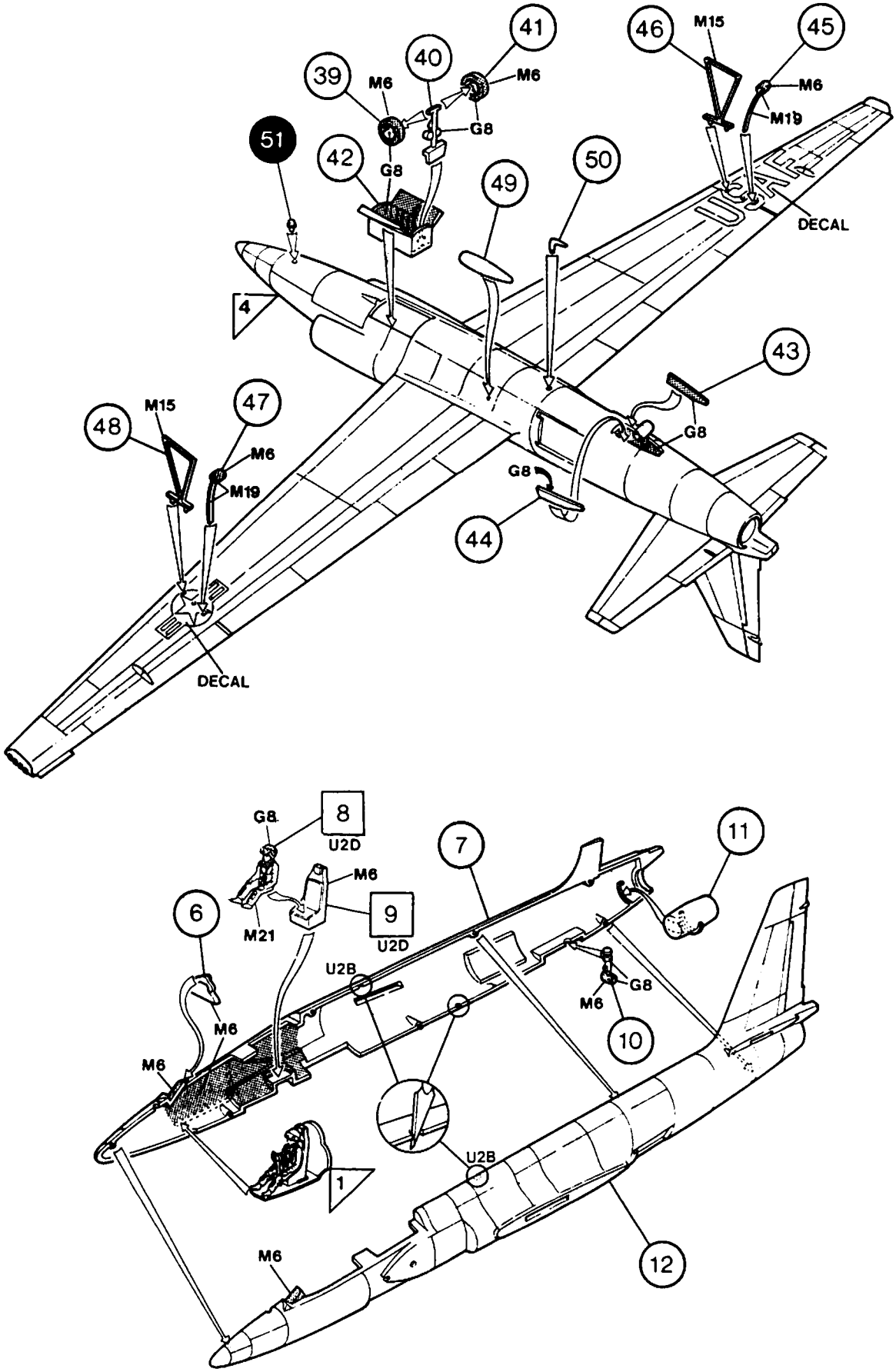
Signed,

_____

Casey Kasem

Dated _____

Cc:Andrew Lewis, V. P. for Business Affairs: Island Records, New York
Jeff Selman, attorney for Negativland: Severson & Werson, San Francisco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U2D
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EPILOGUE

It is now over 3 years since the release of the *U2/Negativland* single. As you will notice, there is hardly a satisfactory ending to this all-too-common tale of creative instincts caught in the grip of copyright laws designed exclusively by and for economic interests. It seems unlikely that our single will ever be returned to us, although we will continue our attempt to retrieve it. But out of this little personal experience with the rules of cultural ownership, much has emerged for our group. We now *understand* the law well enough to know where the problems lie, and to see where the potential solutions lie.

We will continue to protest and publicize the criminalization of artistic appropriation, a significant creative technique which continues to be unrecognized, ignored, or consciously suppressed by our current copyright laws. We will continue to seek a review and revision of the U.S. Copyright Act, specifically in its definitions of "Fair Use", so that laws which profoundly affect artists might once again be respected by them. We will continue to expose those responsible for formulating and promoting copyright law to the simple logic that mass-duplicated cultural works, "popular" or otherwise, comprise absolutely unique and special forms of "commodities" within a society which, according to the very definition of "culture," are *intended* to be shared by everyone.

Art is how a whole society speaks, not only to itself but to the ages. Art has always been a reflection of the culture from which it emerges, and has always evolved in uniquely self-referential ways. Art does not come to us as one "original" idea after another. The law must educate itself to the fact that ever since monkeys saw and did, *the entire history of all art forms has been* BASED ON THEFT– in the most useful sense of that word. Without detailing all the recent technology available to artists which *encourages* this creative tradition, we suggest adjusting these pre-electric ideas of the supreme and absolute necessity for private property rights *within this one, specific area:* the private "ownership" of our

ture. We are suggesting that our modern surrender of the age-old concept of shared culture to the exclusive interests of private owners has relegated our population to spectator status and transformed our culture into an *economic* commodity.

The details of the changes in concepts of cultural ownership we suggest are not as revolutionary as this may sound, and, if it is deemed necessary, could easily include formulas of reasonable compensation, perhaps derived from a pool of extremely tiny taxes on reproduction and capturing technologies of all kinds, to be paid to creators who would file claims once they discover that their works have been partially copied into new works by other creators. Our present prohibitive usage fees and the fickle granting of permission now required of each individual, fragmentary appropriation *should be eliminated* in order to encourage, not inhibit, all the well-established modes of creation involving the fragmentary re-use of existing work. The practical effect of present copyright law is to reserve these creative practices for only the wealthy and the flattering.

The Copyright Clause of the U. S. Constitution and the Fair Use statute within the U.S. Copyright Act already present the basic concept for this needed attitude shift, and they should be the focus of anyone contemplating changes. Presently, Fair Use "justice" must be *fought for* by each "infringer" against the law's automatic presumptions of ownership, creating a mammoth economic barrier which prevents most truly "fair users" from ever reaching court to defend their usage. As in our case, wealthy copyright owners depend on the *threat* of expensive lawsuits to force out-of-court settlements, which almost always consign the offending work to oblivion. The creative freedoms promised by the Fair Use principle, limited as they are in current interpretation, are practically moot due to the *financial cost* of securing them in court.

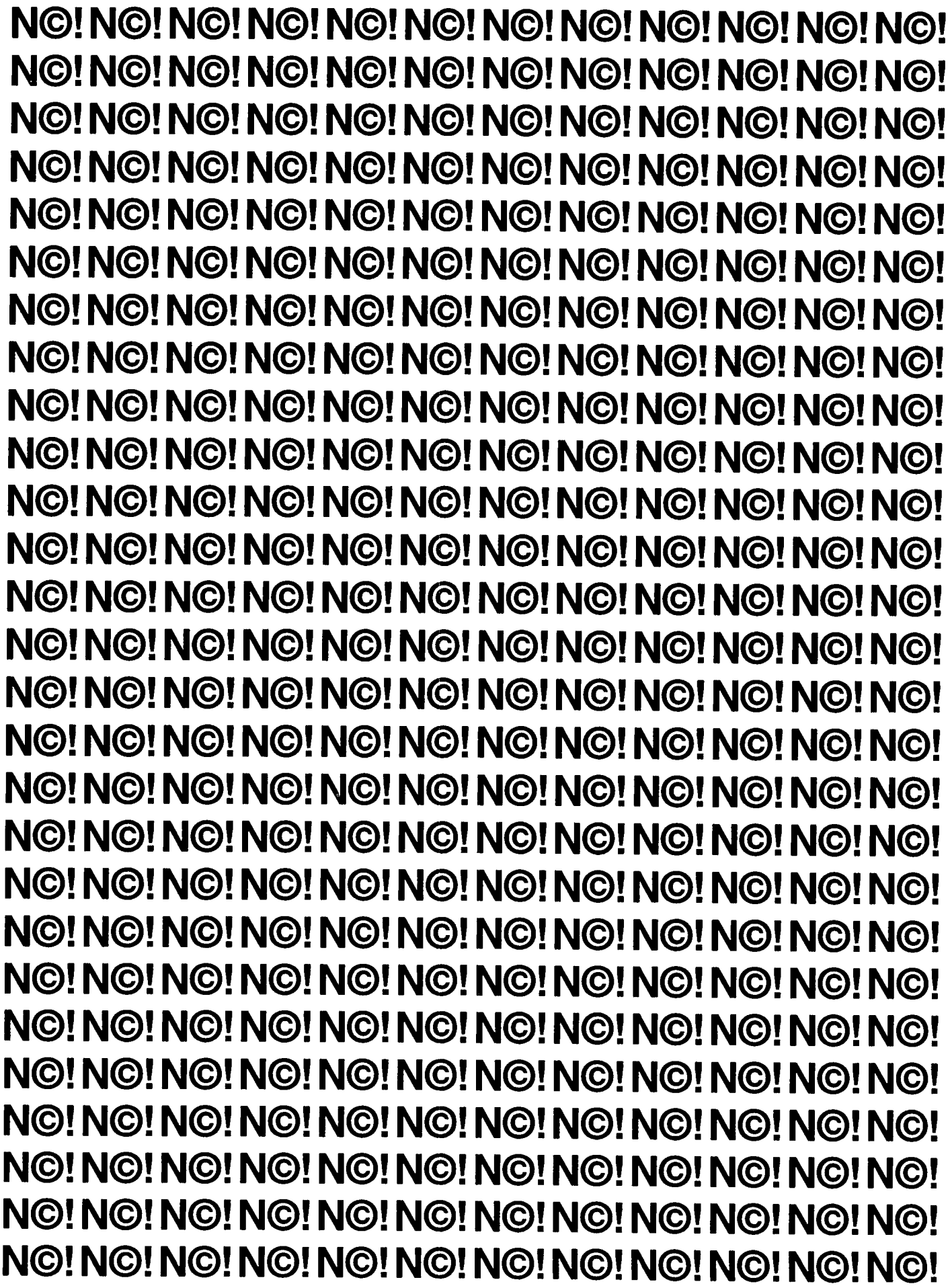
Due to corporate culture's tunnel vision of self-preservation and their unrestrained "right" to not just protect, but to constantly *expand* all possible economic exploitations of their private cultural properties, this will be a tough nut to crack. Now that culture *is* a trans-national business, run not on artistic motivations but on the bottom lines drawn by lawyers and accountants, we must work to influence the hearts of art which still exist outside those private reserves of mass-produced culture, and hope the law will see the light.

There is a very important cultural battle afoot to decide who will have the ultimate control over what art will consist of. All of history and common sense suggest that it should be artists but, as things stand, it is their marketers who "own" the work and who have the power to routinely deny any form of re-use of their properties in new work by other artists. These very "public" properties may be crucial to new works involving satire, parody, collage, surrealism, documentary, critical commentary, and many modern forms *based on* direct reference and sampling techniques. It is also the marketer's prerogative to censor and/or bankrupt the creators of such works when they come into unauthorized existence despite the artistically oblivious laws, as they always will. Artistic activity has never been and should not now be *determined* by law. A wise society which actually values what artists envision to do would seek to accommodate the always-unpredictable evolution of artistic impulses, and consider adjusting antique laws which are found to restrict new and useful forms of expression.

The extensive Appendix which follows compiles a great variety of diverse views on appropriation in the arts, and should be useful to anyone interested in researching the culture-wide reasons why changes are in the wind.

– Negativland

January, 1995


NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO! NO!

APPENDIX 1
A FAIR USE READER

A. Original *Fair Use* Essay, by Negativland (1992) 195
B. Dissenting Opinion in the Vanna White Case (1993) 198
C. *Mocking the Monopoly of Copyright*, by L. Ray Patterson (1994) 203
D. *Don't Stop That Funky Beat*, by Jason Marcus (1993) 205
E. *Plunderphonics*, by John Oswald (1985) 213
F. *Taking Sampling Fifty Times Beyond the Expected* (John Oswald Interview, 1990) .218
G. *Renaming That Tune: Audio Collage, Parody, and Fair Use*, by Alan Korn (1992) ...221
H. *Domains of Origin vs. Domains of Use*, by Walter Alter 235
I. The Supreme Court's 2 Live Crew Decision (1994) 236
J. *Copyright, Fair Use, and the Law*, by Negativland (1994) 242
K. *The Economy of Ideas*, by John Perry Barlow (1993) (Excerpt) 247
L. Negativland's *Tenets of Free Appropriation* (1993) 251

Mockingbirds are the true artists of the bird kingdom. Which is to say, although they're born with a song of their own, an innate riff that happens to be one of the most versatile of all ornithological expressions, mockingbirds aren't content to merely play the hand that is dealt them. Like all artists, they are out to *rearrange* reality. Innovative, willful, daring, not bound by the rules to which others may blindly adhere, the mockingbird collects snatches of birdsong from this tree and that field, appropriates them, places them in new and unexpected contexts, recreates the world from the world. For example, a mockingbird in South Carolina was heard to blend a song of thirty-two different kinds of birds into a ten-minute performance, a virtuoso display that served no practical purpose, falling, therefore, into the realm of pure art.

As the couple walked up to their Buick, two mockingbirds flew away from its grill, one of them tweeting in a little-known dialect of goldfinch, the other mixing a catbird with a raspy chord borrowed from a woodpecker. For centuries, mockingbirds had hunted live insects and foraged for seeds, but when motorcars began to appear in numbers on southern roads, they learned that they could dine more easily by simply picking dead bugs off the radiators of parked autos. Mockingbirds. Inventing new tricks to subsidize their own expression. *Artists!*

–*Excerpt from* Skinny Legs and All *by Tom Robbins*

FAIR USE

by Negativland

As Duchamp pointed out many decades ago, the act of selection can be a form of inspiration as original and significant as any other. Throughout our various mass mediums, we now find many artists who work by "selecting" existing cultural material to collage with, to create with, and to comment with. In general, this continues to be a direction that both "serious"and "popular" arts like. But is it theft? Do artists, for profit or not, have the right to freely "sample" from an already "created" electronic environment that surrounds them for use in their own work?

The psychology of art has always favored fragmentary "theft" in a way which does not engender a loss to the owner. In fact, most artists speak freely about the amount of stuff they have stolen at one time or another. In the realm of ideas, techniques, styles, etc. most artists know that stealing (or call it 'being influenced' if you want to sound legitimate) is not only OK, but desirable and even crucial to creative evolution. This proven route to progress has prevailed among artists since art began and will not be denied. To creators, it is simply obvious in their own experience.

Now some will say there is a big difference between stealing ideas, techniques, and styles which are not easily copyrighted, and stealing actual material, which is easily copyrighted. However, aside from the copyright deterrence factor which now prevails throughout our law-bound art industries, we can find nothing intrinsically wrong with an artist deciding to incorporate existing art "samples" into their own work. The fact that we have economically motivated laws against it does not necessarily make it an undesirable artistic move. In fact, this kind of theft has a well-respected tradition in the arts extending back to the Industrial Revolution.

In the early years of this century, Cubists began to attach found materials such as product packaging and photographs to their paintings. This now seems an obvious and perfectly natural desire to embody or transform existing things into their own work as a form of dialogue with their material environment. And that "material" environment began to grow in strange new ways. Appropriation in the arts has now spanned the entire century, crossing mediumistic boundaries, and constantly expanding in emotional relevance from beginning to end regardless of the rise and fall of "style fronts." It flowered through collage, Dada's found objects and concept of "detournement," and peaked in the visual arts at mid-century with Pop Art's appropriation of mass culture icons and mass media imagery. Now, at the end of this century, it is in music where we find appropriation raging anew as a major creative method and legal controversy.

We think it's about time that the obvious esthetic validity of appropriation begins to be raised in opposition to the assumed preeminence of copyright laws prohibiting the free reuse of cultural material. Has it occurred to anyone that the private ownership of mass culture is a bit of a contradiction in terms?

Artists have always perceived the environment around them as both inspiration to act and as raw material to mold and remold. However, this particular century has presented us with a new kind of influence in the human environment. We are now all immersed in an an ever-growing media environment– an environment just as real and just as affecting as the natural one from which it somehow sprang. Today we are surrounded by canned ideas, images, music, and text. My television set recently told me that 70 to 80 percent of our population now gets most of their

information about the world from their television sets. Most of our opinions are no longer born out of our own experience. They are received opinions. Large increments of our daily sensory input are not focused on the physical reality around us, but on the media that saturates it. As artists, we find this new electrified environment irresistibly worthy of comment, criticism, and manipulation.

The act of appropriating from this media assault represents a kind of liberation from our status as helpless sponges which is so desired by the advertisers who pay for it all. It is a much needed form of self defense against the one-way, corporate-consolidated media barrage. Appropriation sees media, itself, as a telling source and subject, to be captured, rearranged, even mutilated, and injected back into the barrage by those who are subjected to it. Appropriators claim the right to create with mirrors.

Our corporate culture, on the other hand, is determined to reach the end of this century maintaining its economically dependent view that there is something wrong with all this. However, both perceptually and philosophically, it remains an uncomfortable wrenching of common sense to deny that when something hits the airwaves it is literally in the public domain. The fact that the owners of culture and its material distribution can claim this isn't true is a tribute to their ability to restructure common sense for maximum profit.

Our cultural evolution is no longer allowed to unfold in the way that pre-copyright culture always did. True folk music, for example, is no longer possible. The original folk process of incorporating previous melodies and lyrics into constantly evolving songs is impossible when melodies and lyrics are privately owned. We now exist in a society so choked and inhibited by cultural property and copyright protections that the very idea of mass culture is now primarily propelled by economic gain and the rewards of ownership. To be sure, when these laws came about there were bootlegging abuses to be dealt with, but the self-serving laws that resulted have criminalized the whole idea of making one thing out of another.

Our dense, international web of copyright restrictions was initiated and lobbied through the Congresses of the world, not by anyone who makes art, but by the parasitic middle men of culture– the corporate publishing and management entities who saw an opportunity to enhance their own and their clients' income by exploiting a wonderfully human activity that was proceeding naturally around them as it always had– the reuse of culture. These cultural representers– the lawyers behind the administrators, behind the agents, behind the artists– have succeeded in mining every possible peripheral vein of monetary potential in their art properties. All this is lobbied into law under the guise of upholding the interests of artists in the marketplace, and Congress, with no exposure to an alternative point of view, always accommodates them.

That being the case, there are two types of appropriation taking place today: legal and illegal. So, you may ask, if this type of work must be done, why can't everyone just follow the rules and do it the legal way? Negativland remains on the shady side of existing law because to follow it would put us out of business. Here is a personal example of how copyright law actually serves to prevent a wholly appropriate creative process which inevitably emerged out of our reproducing technologies.

In order to appropriate or sample even a few seconds of almost anything out there, you are supposed to do two things: Get permission and pay clearance fees. The permission aspect becomes an unavoidable roadblock to anyone who may intend to use the material in a context unflattering to the performer or work involved. This happens to be exactly what we want to do. Dead end. Imagine how much critical satire would get made if you were required to get prior permission from the subject of your satire? The payment aspect is an even greater obstacle to us. Negativland is a small group of people dedicated to maintaining our critical stance by staying out of the corporate mainstream. We create and manufacture our own work, on our own label, on our own meager incomes and borrowed money. Our work is typically packed with found elements, brief fragments recorded from all media. This goes way beyond one or two, or ten or twenty elements. We can use a hundred different elements on a single record. Each of these audio fragments has a different owner and each of these owners must be located. This is usually impossible because the fragmentary nature of our long-ago random capture

from radio or TV does not include the owner's name and address. If findable, each one of these owners, assuming they each agree with our usage, must be paid a fee which can range from hundreds to thousands of dollars each. Clearance fees are set, of course, for the lucrative inter-corporate trade. Even if we were somehow able to afford that, there are the endless frustrations involved in just trying to get lethargic and unmotivated bureaucracies to get back to you. Thus, both our budget and our release schedule would be completely out of our own hands. Releases can be delayed literally for years. As tiny independents, depending on only one release at a time, we can't proceed under those conditions. In effect, any attempt to be legal would shut us down.

So OK, we're just small potato heads, working in a way that wasn't foreseen by the law, and it's just too problematical, so why not just work some other way? We are working this way because it's just plain interesting, and emulating the various well-worn status quos isn't. How many artistic prerogatives should we be willing to give up in order to maintain our owner-regulated culture? The directions art wants to take may sometimes be dangerous, the risk of democracy, but they certainly should not be dictated by what business wants to allow. Look it up in the dictionary– art is not defined as a business! Is it a healthy state of affairs when business attorneys get to lock in the boundaries of experimentation for artists, or is this a recipe for cultural stagnation?

Negativland proposes some possible revisions in our copyright laws which would, very briefly, clear all restrictions from any practice of fragmentary appropriation. In general, we support the broad intent of copyright law. But we would have the protections and payments to artists and their administrators restricted to the straight-across usage of entire works by others, or for any form of usage at all by commercial advertisers. Beyond that, creators would be free to incorporate fragments from the creations of others into their own work. As for matters of degree, a "fragment" might be defined as "less than the whole", to give the broadest benefit of the doubt to unpredictability. However, a simple compilation of nearly whole works, if contested by the owner, would not pass a crucial test for valid free appropriation. Namely: whether or not the material used is superceded by the new nature of the usage, itself– is the whole more than the sum of its parts? When faced with actual examples, this is usually not difficult to evaluate.

Today, this kind of encouragement for our natural urge to remix culture appears only vaguely within the copyright act under the "Fair Use" doctrine. The Fair Use statutes are intended to allow for free appropriation in certain cases of parody or commentary. Currently these provisions are conservatively interpreted and withheld from many "infringers". A huge improvement would occur if the Fair Use section of existing law was expanded or liberalized to allow any partial usage for any reason. (Again, "the whole is greater than the sum of its parts" test.) If this occurred, the rest of copyright law might stay pretty much as it is, (if that's what we want) and continue to apply in all cases of "whole" theft for commercial gain (bootlegging entire works). The beauty of the Fair Use Doctrine is that it is the only nod to the possible need for artistic freedom and free speech in the entire copyright law, and it is already capable of overriding the other restrictions. Court cases of appropriation which focus on Fair Use and its need to be updated could begin to open up this cultural quagmire through legal precedent.

Until some such adjustments occur, modern societies will continue to find the corporate stranglehold on cultural "properties" in a stubborn battle with the common sense and natural inclinations of their user populations.

B. Dissenting Opinion in the Vanna White Case

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOS ANGELES, CALIFORNIA

Case No. 90-55840

VANNA WHITE,
PLAINTIFF-APPELLANT,

v.

SAMSUNG ELECTRONICS AMERICA, INC.;
DAVID DEUTSCH ASSOCIATES,
DEFENDANTS-APPELLEES.

MARCH 18, 1993

❖ ❖ ❖

ORDER

The panel has voted unanimously to deny the petition for rehearing. Judge Pregerson has voted to reject the suggestion for rehearing *en banc*, and Judge Goodwin so recommends. Judge Alarcon has voted to accept the suggestion for rehearing *en banc*.

The full court has been advised of the suggestion for rehearing *en banc*. An active judge requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing* en banc *is REJECTED.

❖ ❖ ❖

DISSENT BY JUDGE KOZINSKI

I

Saddam Hussein wants to keep advertisers from using his picture in unflattering contexts[1]. Clint Eastwood doesn't want tabloids to write about him[2]. Rudolf Valentino's heirs want to control his film biography[3]. The Girl Scouts don't want their image soiled by association with certain activities[4]. George Lucas wants to keep Strategic Defense Initiative fans from calling it "Star Wars."[5] Pepsico doesn't want singers to use the word "Pepsi" in their songs[6]. Guy Lombardo wants an exclusive property right to ads that show big bands playing on New Year's Eve[7]. Uri Geller thinks he should be paid for ads showing psychics bending metal through telekinesis[8]. Paul Prudhomme, that household name, thinks the same about ads featuring corpulent bearded chefs[9]. And scads of copyright holders see purple when their creations are made fun of[10].

Something very dangerous is going on here. Private property, including intellectual property, is essential to our way of life. It provides an incentive for investment and innovation; it stimulates the flourishing of our culture; it protects the moral entitlements of people to the fruits of their labors. But reducing too much to private property can be bad medicine. Private land, for instance, is far more useful if separated from other private land by public streets, roads and highways. Public parks, utility rights-of-way and sewers reduce the amount of land in private hands, but vastly enhance the value of the property that remains.

So too it is with intellectual property. Overprotecting intellectual property is as harmful as underprotecting it. Creativity is impossible without a rich public domain. Nothing today, likely nothing since we tamed fire, is genuinely new: Culture, like science and technology, grows by accretion, each new creator building on the works of those who came before. Overprotection stifles the very creative forces it's supposed to nurture[11]. The panel's opinion is a classic case of overprotection. Concerned about what it sees as a wrong done to Vanna White, the panel majority erects a property right of remarkable and dangerous breadth: Under the majority's opinion, it's now a tort for advertisers to remind the public of a celebrity. Not to use a celebrity's name, voice, signature or likeness; not to imply the celebrity endorses a product; but simply to evoke the celebrity's image in the public's mind. This Orwellian notion withdraws far more from the public domain than prudence and common sense allow. It coflicts with the Copyright Act and the Copyright Clause *[of the U.S. Constitution]*. It raises serious First Amendment problems. It's bad law, and it deserves a long, hard second look.

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1. See Eben Shapiro, Rising Caution on Using Celebrity Images, N.Y. Times, Nov. 4, 1992, at D20 (Iraqi diplomat objects on right of publicity grounds to ad containing Hussein's picture and caption "History has shown what happens when one source controls all the information").

2. *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 198 Cal. Rptr. 342 (1983).

3. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 160 Cal. Rptr. 352, 603 P.2d 454 (1979) (Rudolph Valentino); see also *Maheu v. CBS, Inc.*, 201 Cal. App. 3d 662, 668, 247 Cal. Rptr. 304 (1988) (aide to Howard Hughes). *Cf.* Frank Gannon, Vanna Karenina in Vanna Karenina and Other Reflections (1988) (A humorous short story with a tragic ending. "She thought of the first day she had met VR _ _ SKY. How foolish she had been. How could she love a man who wouldn't even tell her all the letters in his name?").

4. *Girl Scouts v. Personality Posters Mfg.*, 304 F. Supp. 1228 (S.D.N.Y. 1969) (poster of a pregnant girl in a Girl Scout uniform with the caption "Be Prepared")

5. *Lucasfilm Ltd. v. High Frontier*, 622 F. Supp. 931 (D.D.C. 1985).

6. Pepsico Inc. claimed the lyrics and packaging of grunge rocker Tad Doyle's "Jack Pepsi" song were "offensive to [it] and [are] likely to offend [its] customers," in part because they "associate [Pepsico] and its Pepsi marks with intoxication and drunk driving." Russell, Doyle Leaves Pepsi Thirsty for Compensation, Billboard, June 15, 1991, at 43. Conversely, the Hell's Angels recently sued Marvel Comics to keep it from publishing a comic book called "Hell's Angel," starring a character of the same name. Marvel settled by paying $35,000 to charity and promising never to use the name "Hell's Angel" again in connection with any of its publications. Marvel, Hell's Angels Settle Trademark Suit, L.A. Daily J., Feb. 2, 1993, § II, at 1.

Trademarks are often reflected in the mirror of our popular culture.

See Truman Capote, Breakfast at Tiffany's (1958); Kurt Vonnegut, Jr., Breakfast of Champions (1973); Tom Wolfe, The Electric Kool-Aid Acid Test (1968) (which, incidentally, includes a chapter on the Hell's Angels); Larry Niven, Man of Steel, Woman of Kleenex in All the Myriad Ways (1971); Looking for Mr. Goodbar (1977); The Coca-Cola Kid (1985) (using Coca-Cola as a metaphor for American commercialism); The Kentucky Fried Movie (1977); Harley Davidson and the Marlboro Man (1991); The Wonder Years (ABC 1988-present) ("Wonder Years" was a slogan of Wonder Bread); Tim Rice & Andrew Lloyd Webber, Joseph and the Amazing Technicolor Dream Coat (musical).

Hear Janis Joplin, Mercedes Benz, on Pearl (CBS 1971); Paul Simon, Kodachrome, on There Goes Rhymin' Simon (Warner 1973); Leonard Cohen, Chelsea Hotel, on The Best of Leonard Cohen (CBS 1975); Bruce Springsteen, Cadillac Ranch, on The River (CBS 1980); Prince, Little Red Corvette, on 1999 (Warner 1982); dada, Dizz Knee Land, on Puzzle (IRS 1992) ("I just robbed a grocery store - I'm going to Disneyland / I just flipped off President George - I'm going to Disneyland"); Monty Python, Spam, on The Final Rip Off (Virgin 1988); Roy Clark, Thank God and Greyhound [You're Gone], on Roy Clark's Greatest Hits Volume I (MCA 1979); Mel Tillis, Coca-Cola Cowboy, on The Very Best of (MCA 1981) ("You're just a Coca-Cola cowboy / You've got an Eastwood smile and Robert Redford hair . . .").

Dance to Talking Heads, Popular Favorites 1976-92: Sand in the Vaseline (Sire 1992); Talking Heads, Popsicle, on *id.*

Admire Andy Warhol, Campbell's Soup Can. *Cf.* REO Speedwagon, 38 Special, and Jello Biafra of the Dead Kennedys.

The creators of some of these works might have gotten permission from the trademark owners, though it's unlikely Kool-Aid relished being connected with LSD, Hershey with homicidal maniacs, Disney with armed robbers, or Coca-Cola with cultural imperialism. Certainly no free society can demand that artists get such permission.

7. *Lombardo v. Doyle, Dane & Bernbach, Inc.*, 58 A.D.2d 620, 396 N.Y.S.2d 661 (1977).

8. *Geller v. Fallon McElligott*, No. 90-Civ-2839 (S.D.N.Y. July 22, 1991) (involving a Timex ad).

II

Samsung ran an ad campaign promoting its consumer electronics. Each ad depicted a Samsung product and a humorous prediction: One showed a raw steak with the caption "Revealed to be health food. 2010 A.D." Another showed Morton Downey, Jr. in front of an American flag with the caption "Presidential candidate. 2008 A.D."[12] The ads were meant to convey– humorously– that Samsung products would still be in use twenty years from now.

The ad that spawned this litigation starred a robot dressed in a wig, gown and jewelry reminiscent of Vanna White's hair and dress; the robot was posed next to a Wheel-of-Fortune-like game board. See Appendix. The caption read "Longest-running game show. 2012 A.D." The gag here, I take it, was that Samsung would still be around when White had been replaced by a robot.

Perhaps failing to see the humor, White sued, alleging Samsung infringed her right of publicity by "appropriating" her "identity." Under California law, White has the exclusive right to use her name, likeness, signature and voice for commercial purposes. Cal. Civ. Code § 3344(a); *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 417, 198 Cal. Rptr. 342, 347 (1983). But Samsung didn't use her name, voice or signature, and it certainly didn't use her likeness. The ad just wouldn't have been funny had it depicted White or someone who resembled her - the whole joke was that the game show host(ess) was a robot, not a real person. No one seeing the ad could have thought this was supposed to be White in 2012.

The district judge quite reasonably held that, because Samsung didn't use White's name, likeness, voice or signature, it didn't violate her right of publicity. 971 F.2d at 1396-97. Not so, says the panel majority: The California right of publicity can't possibly be limited to name and likeness. If it were, the majority reasons, a "clever advertising strategist" could avoid using White's name or likeness but nevertheless remind people of her with impunity, "effectively eviscerating" her rights. To prevent this "evisceration," the panel majority holds that the right of publicity must extend beyond name and likeness, to any "appropriation" of White's "identity"– anything that "evokes" her personality. *Id.* at 1398-99.

9. *Prudhomme v. Procter & Gamble Co.*, 800 F. Supp. 390 (E.D. La. 1992).

10. *E.g., Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429 (6th Cir. 1992); *Cliffs Notes v. Bantam Doubleday Dell Publishing Group, Inc.*, 886 F.2d 490 (2d Cir. 1989); *Fisher v. Dees*, 794 F.2d 432 (9th Cir. 1986); *MCA, Inc. v. Wilson*, 677 F.2d 180 (2d Cir. 1981); *Elsmere Music, Inc. v. NBC*, 623 F.2d 252 (2d Cir. 1980); *Walt Disney Prods. v. The Air Pirates*, 581 F.2d 751 (9th Cir. 1978); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir. 1964); *Lowenfels v. Nathan*, 2 F. Supp. 73 (S.D.N.Y. 1932).

11. See Wendy J. Gordon, A Property Right in Self Expression: Equality and Individualism in the Natural Law of Intellectual Property, 102 Yale L.J. - -, Part IV(A) (forthcoming 1993).

12. I had never heard of Morton Downey, Jr., but I'm told he's sort of like Rush Limbaugh, but not as shy.

III

But what does "evisceration" mean in intellectual property law? Intellectual property rights aren't like some constitutional rights, absolute guarantees protected against all kinds of interference, subtle as well as blatant[13]. They cast no penumbras, emit no emanations: The very point of intellectual property laws is that they protect only against certain specific kinds of appropriation. I can't publish unauthorized copies of, say, Presumed Innocent; I can't make a movie out of it. But I'm perfectly free to write a book about an idealistic young prosecutor on trial for a crime he didn't commit[14]. So what if I got the idea from Presumed Innocent? So what if it reminds readers of the original? Have I "eviscerated" Scott Turow's intellectual property rights? Certainly not. All creators draw in part on the work of those who came before, referring to it, building on it, poking fun at it; we call this creativity, not piracy[15].

The majority isn't, in fact, preventing the "evisceration" of Vanna White's existing rights; it's creating a new and much broader property right, a right unknown in California law[16]. It's replacing the existing balance between the interests of the celebrity and those of the public by a different balance, one substantially more favorable to the celebrity. Instead of having an exclusive right in her name, likeness, signature or voice, every famous person now has an exclusive right to anything that reminds the viewer of her. After all, that's all Samsung did: It used an inanimate object to remind people of White, to "evoke [her identity]," 971 F.2d at 1399[17].

Consider how sweeping this new right is. What is it about the ad that makes people think of White? It's not the robot's wig, clothes or jewelry; there must be ten million blond women (many of them quasi-famous) who wear dresses and jewelry like White's. It's that the robot is posed near the "Wheel of Fortune" game board. Remove the game board from the ad, and no one would think of Vanna White. See Appendix. But once you include the game board, anybody standing beside it - a brunette woman, a man wearing women's clothes, a monkey in a wig and gown - would evoke White's image, precisely the way the robot did. It's the "Wheel of Fortune" set, not the robot's face or dress or jewelry that evokes White's image. The panel is giving White an exclusive right not in what she looks like or who she is, but in what she does for a living[18].

13. *Cf., e.g., Guinn v. United States*, 238 U.S. 347, 364-65, 59 L. Ed. 1340, 35 S. Ct. 926 (1915) (striking down grandfather clause that was a clear attempt to evade the Fifteenth Amendment).

14. It would be called "Burden of Going Forward with Evidence," and the hero would ultimately be saved by his lawyer's adept use of Fed. R. Evid. 301.

15. In the words of Sir Isaac Newton, "if I have seen further it is by standing on [the shoulders] of Giants." Letter to Robert Hooke, Feb. 5, 1675/1676. Newton himself may have borrowed this phrase from Bernard of Chartres, who said something similar in the early twelfth century. Bernard in turn may have snatched it from Priscian, a sixth century grammarian. See *Lotus Dev. Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 77 n.3 (D. Mass. 1990).

16. In fact, in the one California case raising the issue, the three state Supreme Court Justices who discussed this theory expressed serious doubts about it. *Guglielmi v. Spelling-Goldberg Prods.*, 25 Cal. 3d 860, 864 n.5, 160 Cal. Rptr. 352, 355, 603 P.2d 454 n.5 (1979) (Bird, C.J., concurring) (expressing skepticism about finding a property right to a celebrity's "personality" because it is "difficult to discern any easily applied definition for this amorphous term").

Neither have we previously interpreted California law to cover pure "identity." *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), and *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992), dealt with appropriation of a celebrity's voice. See *id.* at 1100-01 (imitation of singing style, rather than voice, doesn't violate the right of publicity). *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974), found a violation of the right of publicity, but stressed that, though the plaintiff's likeness wasn't directly recognizable by itself, the surrounding circumstances would have made viewers think the likeness was the plaintiff's. *Id.* at 827; see also *Moore v. Regents of the Univ. of Cal.*, 51 Cal. 3d 120, 138, 271 Cal. Rptr. 146, 157, 793 P.2d 479 (1990) (construing *Motschenbacher* as "holding that every person has a proprietary interest in his own likeness").

17. Some viewers might have inferred White was endorsing the product, but that's a different story. The right of publicity isn't aimed at or limited to false endorsements, *Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 419-20, 198 Cal. Rptr. 342, 348 (1983); that's what the Lanham *[Trademark]* Act is for.

Note also that the majority's rule applies even to advertisements that unintentionally remind people of someone. California law is crystal clear that the common-law right of publicity may be violated even by unintentional appropriations. *Id.* at 417 n.6, 198 Cal. Rptr. at 346 n.6; *Fairfield v. American Photocopy Equipment Co.*, 138 Cal. App. 2d 82, 87, 291 P.2d 194 (1955).

18. Once the right of publicity is extended beyond specific physical characteristics, this will become a recurring problem: Outside name, likeness and voice, the one thing that most reliably reminds the public of someone are the actions or roles they're famous for. A commercial with an astronaut setting foot on the moon would evoke the image of Neil Armstrong. Any masked man on horseback would remind people (over a certain age) of Clayton Moore. And any number of songs– "My Way," "Yellow Submarine," "Like a Virgin," "Beat It," "Michael, Row the Boat Ashore," to name only a few– instantly evoke an image of the person or group who made them famous, regardless of who is singing.

See also Carlos V. Lozano, West Loses Lawsuit over Batman TV Commercial, L.A. Times, Jan. 18, 1990, at B3 (Adam West sues over Batman-like character in commercial); *Nurmi v. Peterson*, 1989 U.S. Dist. LEXIS 9765, 10 U.S.P.Q.2D (BNA) 1775 (C.D. Cal. 1989) (1950s TV movie hostess "Vampira" sues 1980s TV hostess "Elvira"); text accompanying notes 7-8 (lawsuits brought by Guy Lombardo, claiming big bands playing at New Year's Eve parties remind people of him, and by Uri Geller, claiming psychics who can bend metal remind people of him). *Cf. Motschenbacher*, where the claim was that viewers would think plaintiff was actually in the commercial, and not merely that the commercial reminded people of him.

This is entirely the wrong place to strike the balance. Intellectual property rights aren't free: They're imposed at the expense of future creators and of the public at large. Where would we be if Charles Lindbergh had an exclusive right in the concept of a heroic solo aviator? If Arthur Conan Doyle had gotten a copyright in the idea of the detective story, or Albert Einstein had patented the theory of relativity? If every author and celebrity had been given the right to keep people from mocking them or their work? Surely this would have made the world poorer, not richer, culturally as well as economically[19].

This is why intellectual property law is full of careful balances between what's set aside for the owner and what's left in the public domain for the rest of us: The relatively short life of patents; the longer, but finite, life of copyrights; copyright's idea-expression dichotomy; the fair use doctrine; the prohibition on copyrighting facts; the compulsory license of television broadcasts and musical compositions; federal preemption of overbroad state intellectual property laws; the nominative use doctrine in trademark law; the right to make soundalike recordings[20]. All of these diminish an intellectual property owner's rights. All let the public use something created by someone else. But all are necessary to maintain a free environment in which creative genius can flourish.

The intellectual property right created by the panel here has none of these essential limitations: No fair use exception; no right to parody; no idea-expression dichotomy. It impoverishes the public domain, to the detriment of future creators and the public at large. Instead of well-defined, limited characteristics such as name, likeness or voice, advertisers will now have to cope with vague claims of "appropriation of identity," claims often made by people with a wholly exaggerated sense of their own fame and significance. See pp. 1-3 & notes 1-10 *supra*. Future Vanna Whites might not get the chance to create their personae, because their employers may fear some celebrity will claim the persona is too similar to her own[21]. The public will be robbed of parodies of celebrities, and our culture will be deprived of the valuable safety valve that parody and mockery create.

Moreover, consider the moral dimension, about which the panel majority seems to have gotten so exercised. Saying Samsung "appropriated" something of White's begs the question: Should White have the exclusive right to something as broad and amorphous as her "identity"? Samsung's ad didn't simply copy White's schtick– like all parody, it created something new[22]. True, Samsung did it to make money, but White does whatever she does to make money, too; the majority talks of "the difference between fun and profit," 971 F.2d at 1401, but in the entertainment industry fun is profit. Why is Vanna White's right to exclusive for-profit use of her persona– a persona that might not even be her own creation, but that of a writer, director or producer– superior to Samsung's right to profit by creating its own inventions? Why should she have such absolute rights to control the conduct of others, unlimited by the idea-expression dichotomy or by the fair use doctrine?

To paraphrase only slightly *Feist Publications, Inc. v. Rural Telephone Service Co.*, 113 L. Ed. 2d 358, 111 S. Ct. 1282, 1289-90 (1991), it may seem unfair that much of the fruit of a creator's labor may be used by others without compensation. But this is not some unforeseen byproduct of our intellectual property system; it is the system's very essence. Intellectual property law assures authors the right to their original expression, but encourages others to build freely on the ideas that underlie it. This result is neither unfair nor unfortunate: It is the means by which intellectual property law advances the progress of science and art. We give authors certain exclusive rights, but in exchange we get a richer public domain. The majority ignores this wise teaching, and all of us are the poorer for it[23].

IV

The panel, however, does more than misinterpret California law: By refusing to recognize a parody exception to the right of publicity, the panel directly contradicts the federal Copyright Act. Samsung didn't merely parody Vanna White. It parodied Vanna White appearing in "Wheel of Fortune," a copyrighted television show, and parodies of copyrighted works are governed by federal copyright law.

Copyright law specifically gives the world at large the right to make "fair use" parodies, parodies that don't borrow too much of the original. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986). Federal copyright law also gives the copyright owner the exclusive right to create (or license the creation of) derivative works, which include parodies that borrow too much to qualify as "fair use." See *Acuff-Rose Music, Inc. v. Campbell*, 972 F.2d 1429, 1434-35 (6th Cir. 1992)[24]. When Mel Brooks, for instance, decided to parody Star Wars, he had two options: He could have stuck with his fair use rights under 17 U.S.C. § 107, or he could have gotten a license to make a derivative work under 17 U.S.C. § 106(b) from the holder of the Star Wars copyright. To be safe, he probably did the latter, but once he did, he was guaranteed a perfect right to make his movie[25].

The majority's decision decimates this federal scheme. It's impossible to parody a movie or a TV show without at the same time "evoking" the "identities" of the actors[26]. You can't have a mock Star Wars without a mock Luke Skywalker, Han Solo and Princess Leia, which in turn means a mock Mark Hamill, Harrison Ford and Carrie Fisher. You can't have a mock Batman commercial without a mock Batman, which means someone emulating the mannerisms of Adam West or Michael Keaton. See Carlos V. Lozano, West Loses Lawsuit over Batman TV Commercial, L.A. Times, Jan. 18, 1990, at B3 (describing Adam West's right of publicity lawsuit over a commercial produced under license from DC Comics, owner of the Batman copyright)[27]. The

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19. See generally Gordon, *supra* note 11.

20. See 35 U.S.C. § 154 (duration of patent); 17 U.S.C. § 302-305 (duration of copyright); 17 U.S.C. § 102(b) (idea-expression dichotomy); 17 U.S.C. § 107 (fair use); *Feist Pubs., Inc. v. Rural Tel. Serv. Co.*, 113 L. Ed. 2d 358, 111 S. Ct. 1282, 1288 (1991) (no copyrighting facts); 17 U.S.C. § 115, 119(b) (compulsory licenses); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 103 L. Ed. 2d 118, 109 S. Ct. 971 (1989) (federal preemption); *New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 306-308 (9th Cir. 1992) (nominative use); 17 U.S.C. § 114(b) (soundalikes); accord *G.S. Rasmussen & Assocs. v. Kalitta Flying Serv., Inc.*, 958 F.2d 896, 900 n.7 (9th Cir. 1992); Daniel A. Saunders, Comment, Copyright Law's Broken Rear Window, 80 Calif. L. Rev. 179, 204-05 (1992). But see *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).

21. If Christian Slater, star of "Heathers," "Pump up the Volume," "Kuffs," and "Untamed Heart"– and alleged Jack Nicholson clone– appears in a commercial, can Nicholson sue? Of 54 stories on LEXIS that talk about Christian Slater, 26 talk about Slater's alleged similarities to Nicholson. Apparently it's his nasal wisecracks and killer smiles, St. Petersburg Times, Jan. 10, 1992, at 13, his eyebrows, Ottawa Citizen, Jan. 10, 1992, at E2, his sneers, Boston Globe, July 26, 1991, at 37, his menacing presence, USA Today, June 26, 1991, at 1D, and his sing-song voice, Gannett News Service, Aug. 27, 1990 (or, some say, his insinuating drawl, L.A. Times, Aug. 22, 1990, at F5). That's a whole lot more than White and the robot had in common.

22. *Cf. New Kids on the Block v. News America Publishing, Inc.*, 971 F.2d 302, 307 n.6 (9th Cir. 1992) ("Where the infringement is small in relation to the new work created, the fair user is profiting largely from his own creative efforts rather than free-riding on another's work.").

23. The majority opinion has already earned some well-deserved criticisms on this score. Stephen R. Barnett, In Hollywood's Wheel of Fortune, Free Speech Loses a Turn, Wall St. J., Sept. 28, 1992, at A14; Stephen R. Barnett, Wheel of Misfortune for Advertisers: Ninth Circuit Misreads the Law to Protect Vanna White's Image, L.A. Daily J., Oct. 5, 1992, at 6; Felix H. Kent, California Court Expands Celebrities' Rights, N.Y.L.J., Oct. 30, 1992, at 3 ("To speak of the 'evisceration' of such a questionable common law right in a case that has probably gone the farthest of any case in any court in the United States of America is more than difficult to comprehend"); Shapiro, *supra* note 1 ("A fat chef? A blond robot in an evening gown? How far will this go?" (citing Douglas J. Wood, an advertising lawyer)).

24. How much is too much is a hotly contested question, but one thing is clear: The right to make parodies belongs either to the public at large or to the copyright holder, not to someone who happens to appear in the copyrighted work.

25. See Spaceballs (1987). Compare Madonna: Truth or Dare (1991) with Medusa: Dare to Be Truthful (1991); Loaded Weapon I (1993) with Lethal Weapon (1987); Young Frankenstein (1974) with Bride of Frankenstein (1935).

26. 17 U.S.C. § 301(b)(1) limits the Copyright Act's preemptive sweep to subject matter "fixed in any tangible medium of expression," but White's identity - her look as the hostess of Wheel of Fortune - is definitely fixed: It consists entirely of her appearances in a fixed, copyrighted TV show. See *Baltimore Orioles v. Major League Baseball Players Ass'n*, 805 F.2d 663, 675 & n.22 (7th Cir. 1986).

27. *Cf. Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 827-28, 160 Cal. Rptr. 323, 331-32, 603 P.2d 425, 433-34 (1979) (Mosk, J., concurring) (pointing out that rights in characters should be owned by the copyright holder, not the actor who happens to play them); *Baltimore Orioles*, 805 F.2d at 674-79 (baseball players' right of publicity preempted by copyright law as to telecasts of games).

public's right to make a fair use parody and the copyright owner's right to license a derivative work are useless if the parodist is held hostage by every actor whose "identity" he might need to "appropriate."

Our court is in a unique position here. State courts are unlikely to be particularly sensitive to federal preemption, which, after all, is a matter of first concern to the federal courts. The Supreme Court is unlikely to consider the issue because the right of publicity seems so much a matter of state law. That leaves us. It's our responsibility to keep the right of publicity from taking away federally granted rights, either from the public at large or from a copyright owner. We must make sure state law doesn't give the Vanna Whites and Adam Wests of the world a veto over fair use parodies of the shows in which they appear, or over copyright holders' exclusive right to license derivative works of those shows. In a case where the copyright owner isn't even a party– where no one has the interests of copyright owners at heart– the majority creates a rule that greatly diminishes the rights of copyright holders in this circuit.

V

The majority's decision also conflicts with the federal copyright system in another, more insidious way. Under the dormant Copyright Clause, state intellectual property laws can stand only so long as they don't "prejudice the interests of other States." *Goldstein v. California,* 412 U.S. 546, 558, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). A state law criminalizing record piracy, for instance, is permissible because citizens of other states would "remain free to copy within their borders those works which may be protected elsewhere." *Id.* But the right of publicity isn't geographically limited. A right of publicity created by one state applies to conduct everywhere, so long as it involves a celebrity domiciled in that state. If a Wyoming resident creates an ad that features a California domiciliary's name or likeness, he'll be subject to California right of publicity law even if he's careful to keep the ad from being shown in California. See *Acme Circus Operating Co. v. Kuperstock,* 711 F.2d 1538, 1540 (11th Cir. 1983); *Groucho Marx Prods. v. Day and Night Co.,* 689 F.2d 317, 320 (2d Cir. 1982); see also *Factors Etc. v. Pro Arts,* 652 F.2d 278, 281 (2d Cir. 1981).

The broader and more ill-defined one state's right of publicity, the more it interferes with the legitimate interests of other states. A limited right that applies to unauthorized use of name and likeness probably does not run afoul of the Copyright Clause, but the majority's protection of "identity" is quite another story. Under the majority's approach, any time anybody in the United States– even somebody who lives in a state with a very narrow right of publicity– creates an ad, he takes the risk that it might remind some segment of the public of somebody, perhaps somebody with only a local reputation, somebody the advertiser has never heard of. See note 17 *supra* (right of publicity is infringed by unintentional appropriations). So you made a commercial in Florida and one of the characters reminds Reno residents of their favorite local TV anchor (a California domiciliary)? Pay up.

This is an intolerable result, as it gives each state far too much control over artists in other states. No California statute, no California court has actually tried to reach this far. It is ironic that it is we who plant this kudzu in the fertile soil of our federal system.

VI

Finally, I can't see how giving White the power to keep others from evoking her image in the public's mind can be squared with the First Amendment. Where does White get this right to control our thoughts? The majority's creation goes way beyond the protection given a trademark or a copyrighted work, or a person's name or likeness. All those things control one particular way of expressing an idea, one way of referring to an object or a person. But not allowing any means of reminding people of someone? That's a speech restriction unparalleled in First Amendment law[28].

What's more, I doubt even a name-and-likeness-only right of publicity can stand without a parody exception. The First Amendment isn't just about religion or politics– it's also about protecting the free development of our national culture. Parody, humor, irreverence are all vital components of the marketplace of ideas. The last thing we need, the last thing the First Amendment will tolerate, is a law that lets public figures keep people from mocking them, or from "evoking" their images in the mind of the public. 971 F.2d at 1399[29].

The majority dismisses the First Amendment issue out of hand because Samsung's ad was commercial speech. *Id.* at 1401 & n.3. So what? Commercial speech may be less protected by the First Amendment than noncommercial speech, but less protected means protected nonetheless. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). And there are very good reasons for this. Commercial speech has a profound effect on our culture and our attitudes. Neutral-seeming ads influence people's social and political attitudes, and themselves arouse political controversy[30]. "Where's the Beef?" turned from an advertising catchphrase into the only really memorable thing about the 1984 presidential campaign[31]. Four years later, Michael Dukakis called George Bush "the Joe Isuzu of American politics."[32]

In our pop culture, where salesmanship must be entertaining and entertainment must sell, the line between the commercial and noncommercial has not merely blurred; it has disappeared. Is the Samsung parody any different from a parody on Saturday Night Live or in Spy Magazine? Both are equally profit-motivated. Both use a celebrity's identity to sell things - one to sell VCRs, the other to sell advertising. Both mock their subjects. Both try to make people laugh. Both add something, perhaps something worthwhile and memorable, perhaps not, to our culture. Both are things that the people being portrayed might dearly want to suppress. See notes 1 & 29 *supra.*

Commercial speech is a significant, valuable part of our national discourse. The Supreme Court has recognized as much, and has insisted that lower courts carefully scrutinize commercial speech restrictions, but the panel totally fails to do this. The panel majority doesn't even purport to apply the *Central Hudson* test, which the Supreme Court devised specifically for determining whether a commercial speech restriction is valid[33]. The majority doesn't ask, as *Central Hudson* requires, whether the speech restriction

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28. Just compare the majority's holding to the intellectual property laws upheld by the Supreme Court. The Copyright Act is constitutional precisely because of the fair use doctrine and the idea-expression dichotomy, *Harper & Row v. Nation Enterprises,* 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985), two features conspicuously absent from the majority's doctrine. The right of publicity at issue in *Zacchini v. Scripps-Howard Broadcasting Co.,* 433 U.S. 562, 576, 53 L. Ed. 2d 965, 97 S. Ct. 2849 (1977), was only the right to "broadcast of petitioner's entire performance," not "the unauthorized use of another's name for purposes of trade." *Id.* Even the statute upheld in *San Francisco Arts & Athletics, Inc. v. United States Olympic Comm.,* 483 U.S. 522, 530, 97 L. Ed. 2d 427, 107 S. Ct. 2971 (1987), which gave the USOC sweeping rights to the word "Olympic," didn't purport to protect all expression that reminded people of the Olympics.

29. The majority's failure to recognize a parody exception to the right of publicity would apply equally to parodies of politicians as of actresses. Consider the case of Wok Fast, a Los Angeles Chinese food delivery service, which put up a billboard with a picture of then-L.A. Police Chief Daryl Gates and the text "When you can't leave the office. Or won't." (This was an allusion to Chief Gates's refusal to retire despite pressure from Mayor Tom Bradley.) Gates forced the restaurant to take the billboard down by threatening a right of publicity lawsuit. Leslie Berger, He Did Leave the Office– And Now Sign Will Go, Too, L.A. Times, July 31, 1992, at B2.

See also Samsung Has Seen the Future: Brace Yourself, Adweek, Oct. 3, 1988, at 26 (ER 72) (Samsung planned another ad that would show a dollar bill with Richard Nixon's face on it and the caption "Dollar bill. 2025 A.D.," but Nixon refused permission to use his likeness).

30. See, e.g., Bruce Horovitz, Nike Does It Again; Firm Targets Blacks with a Spin on "Family Values", L.A. Times, Aug. 25, 1992, at D1 ("The ad reinforces a stereotype about black fathers" (quoting Lawrence A. Johnson of Howard University)); Gaylord Fields, Advertising Awards-Show Mania: CEBA Awards Honors Black-Oriented Advertising, Back Stage, Nov. 17, 1989, at 1 (quoting the Rev. Jesse Jackson as emphasizing the importance of positive black images in advertising); Debra Kaufman, Quality of Hispanic Production Rising to Meet Clients' Demands, Back Stage, July 14, 1989, at 1 (Hispanic advertising professional stresses importance of positive Hispanic images in advertising); Marilyn Elias, Medical Ads Often Are Sexist, USA Today, May 18, 1989, at 1D ("There's lots of evidence that this kind of ad reinforces stereotypes" (quoting Julie Edell of Duke University)).

31. See Wendy's Kind of Commercial; "Where's the Beef" Becomes National Craze, Broadcasting, March 26, 1984, at 57.

32. See Gregory Gordon, Candidates Look for Feedback Today, UPI, Sept. 26, 1988.

33. Its only citation to *Central Hudson* is a seeming afterthought, buried in a footnote, and standing only for the proposition that commercial speech is less protected under the First Amendment. See 971 F.2d at 1401 n.3.

is justified by a substantial state interest. It doesn't ask whether the restriction directly advances the interest. It doesn't ask whether the restriction is narrowly tailored to the interest. See *id.* at 566[34]. These are all things the Supreme Court told us– in no uncertain terms– we must consider; the majority opinion doesn't even mention them[35].

Process matters. The Supreme Court didn't set out the *Central Hudson* test for its health. It devised the test because it saw lower courts were giving the First Amendment short shrift when confronted with commercial speech. See *Central Hudson*, 447 U.S. at 561-62, 567-68. The *Central Hudson* test was an attempt to constrain lower courts' discretion, to focus judges' thinking on the important issues - how strong the state interest is, how broad the regulation is, whether a narrower regulation would work just as well. If the Court wanted to leave these matters to judges' gut feelings, to nifty lines about "the difference between fun and profit," 971 F.2d at 1401, it could have done so with much less effort.

Maybe applying the test would have convinced the majority to change its mind; maybe going through the factors would have shown that its rule was too broad, or the reasons for protecting White's "identity" too tenuous. Maybe not. But we shouldn't thumb our nose at the Supreme Court by just refusing to apply its test.

VII

For better or worse, we are the Court of Appeals for the Hollywood Circuit. Millions of people toil in the shadow of the law we make, and much of their livelihood is made possible by the existence of intellectual property rights. But much of their livelihood - and much of the vibrancy of our culture - also depends on the existence of other intangible rights: The right to draw ideas from a rich and varied public domain, and the right to mock, for profit as well as fun, the cultural icons of our time.

In the name of avoiding the "evisceration" of a celebrity's rights in her image, the majority diminishes the rights of copyright holders and the public at large. In the name of fostering creativity, the majority suppresses it. Vanna White and those like her have been given something they never had before, and they've been given it at our expense.

I cannot agree.

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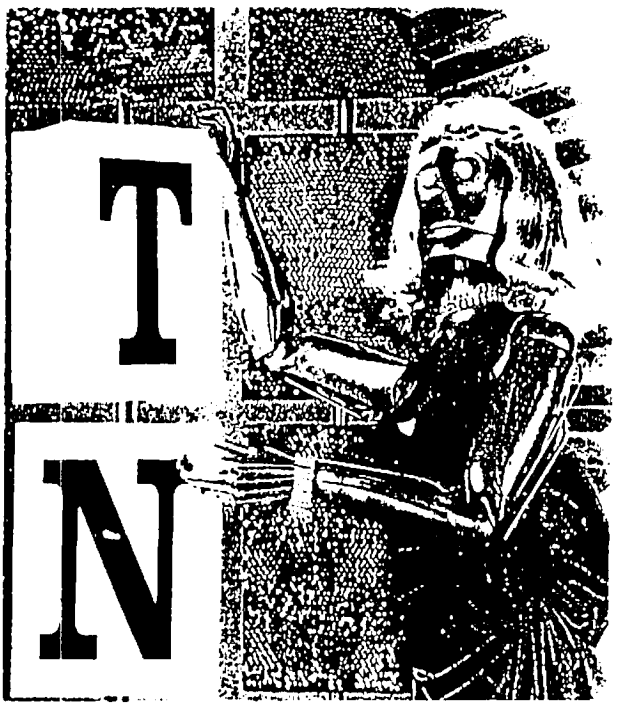
34. See also *Board of Trustees v. Fox*, 492 U.S. 469, 476-81, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989) (reaffirming "narrowly tailored" requirement, but making clear it's not a "least restrictive means" test). The government has a freer hand in regulating false or misleading commercial speech, but this isn't such a regulation. Some "appropriations" of a person's "identity" might misleadingly suggest an endorsement, but the mere possibility that speech might mislead isn't enough to strip it of First Amendment protection. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644, 85 L. Ed. 2d 652, 105 S. Ct. 2265 (1985).

35. Neither does it discuss whether the speech restriction is unconstitutionally vague. *Posadas de P.R. Assocs. v. Tourism Co.*, 478 U.S. 328, 347, 92 L. Ed. 2d 266, 106 S. Ct. 2968 (1986).

Appendix A:

Vanna White

Appendix B:



Ms. C3PO?

Mocking the Monopoly of Copyright

In a commercial world, a parody doesn't infringe original works simply because it is performed for profit. Protection of free speech is found in both the First Amendment and the Constitution's copyright clause.

L. RAY PATTERSON

Recent court decisions addressing parody as a violation of copyright can themselves be viewed as a parody of copyright law: The parody is in their treatment of fair use as an unwarranted taking of another's property if the use is commercial, and their treatment of copyright as a plenary property right rather than a limited statutory monopoly.

Such views have characterized the preliminary injunction issued by a court of the Northern District of California in Berkley Systems Inc. v. Delrina, NO. C93 3545, against a software product that used the cartoon characters Opus and Bill the Cat to parody the popular "Flying Toasters" computer screensaver, and the Sixth Circuit's decision was heard by the U.S. Supreme Court in November, Campbell v. Acuff-Rose, U.S.S.Ct. No. 92-1292.

Courts in most copyright cases manifest a lack of awareness of the import of their decisions, presumably because copyright law has only recently moved from the legal backwaters to the mainstream of American law. All anti-parody decisions erode both the constitutional purpose of copyright, which is the promotion of learning, and the free-speech rights guaranteed by the First Amendment. The notion of copyright as property, however, seems to prevail over both the learning and free-speech goals. Courts smugly point out that the First Amendment is not a license to trample on another's property -- but without determining what the property is or why it exists.

The point that seems to have escaped one and all is that the copyright clause itself contains free-speech values designed primarily to ensure access. The promotion of learning requires the right of access, a free-speech value; the public domain is an anti-censorship feature that promotes free speech; and the requirement of original writings prevents copyright from being used to capture public-domain materials.

THE ACTUAL TEXT

It might help if courts would read the copyright clause of the Constitution, at Article I, Section 8, Paragraph 8, authorizing Congress to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The clause contains three clearly stated policies: the promotion of learning (because it so states); the protection of the public domain (because of the limited-times provision and the limitation of copyright to new writings); and the benefit to the author (the named beneficiary of copyright).

The most important of these may be the public domain for literature, which creates an environment for learning because it makes materials freely accessible to all. Copyright, however, inhibits access to copyrighted materials and thus can pollute the learning environment. (Consider, for example, the *in terrorem* tactics of copyrightists that have frightened public school officials into forbidding any copying of any copyrighted material for the classroom.) This is why the copyright monopoly requires the creation of a new work with a right of access to that work during the copyright term.

The content of this last condition, manifested in the fair use doctrine, depends, however, upon the unexamined question in copyright law -- the meaning of the "exclusive right" that the clause authorizes Congress to grant. The meaning of the exclusive right has significant consequences for fair use.

If it means a plenary property right, then copyright itself is a plenary property right; if it means only the right to publish and vend, then copyright is a series of rights to which a given work is subject. The difference is that the former means a narrower fair use because copyright is a reward for the creation of a work; the latter means a broader fair use because the creation of a work is a condition for the grant of a statutory monopoly.

PROPERTY OR DUTY?

Copyright is either personal property entailing the right exclusion, or it is a privilege entailing a duty to serve the public interest. A purely proprietary copyright, however, is undesirable, because it is the basis for a copyright-bound society in which all learning becomes a commodity for the marketplace and an end in itself rather than a means to improving the lot of the individual of thus of mankind.

The "exclusive right," the meaning of which determines whether copyright is a property or a privilege, has its origin in Elizabethan England, when the Anglo-American copyright was created by publishers, whose task was to publish, not to create. The copyright they created -- the exclusive right to publish and vend -- was designed to, and did, form the basis of their monopoly of the book trade. In this endeavor, the publishers were aided by the government's policy of press control and censorship, made necessary by the religious ferment between Catholics and Protestants brought about by Henry VIII's desire for a male heir and his consequent breach with Rome.

In return for the publishers' aid in controlling the output of the press to prevent the publication of "schismatical, heretical and seditious" material, the government supported the publishers' copyright, then called the stationers' copyright because the publishers were all members of the Stationers' Company.

After the Protestant succession was assured by the Glorious Revolution in 1688, press control became a matter of less concern to the government, and governmental censorship ended some six years later in 1694 with the final demise of the Licensing Act of 1662. The end of this legislation, the only public law support for copyright at the time, led to the conclusion that the old copyright was no longer a legally viable concept.

The publishers sought new legislation from Parliament, but they did not succeed until 1710, when Parliament enacted the first English copyright statute, the Statute of Anne. Commonly viewed as creating an author's copyright, the statute in fact was a trade regulation act, designed to end and prevent the recurrence of the publisher's monopoly and to preclude copyright from being used again as a device of censorship.

READING HISTORY

The relevance of this ancient history to Americas copyright law today is two-fold. First, the Statute of Anne is the source of the language in the Constitution's copyright clause. Second, that clause and the First Amendment have a common origin, the religious conflict in England. Thus it is no coincidence that the First Amendment not only protects the freedom of speech, but also the freedom of religion and the right to assemble for redress of grievances. Thus the primary goal manifested in the clause is not the creation of works, but their publication, and the framers surely intended that the "exclusive right" granted to authors be the exclusive right to publish and vend a work. If consistency in the law -- the basis of integrity -- is important, then the "exclusive right" means only the right to publish and vend. Thus, this meaning is consistent with history, with the public domain, and even with the benefit to the author. More importantly, it is consistent with, and even necessary, for the doctrine of fair use.

Fair use, probably the most misunderstood concept in copyright law, was an expansion in origin, not a limitation, of the author's rights. Justice Story promulgated the doctrine in 1840 in Folsom v. Marsh, involving two biographies of George Washington. The defendant had, in effect, abridged the plaintiff's multivolume biography of Washington into a two-volume version.

At that time, a fair abridgment was not an infringement of copyright, and Justice Story, who did not like the fair abridgment doctrine, rejected it by saying that one author can make a fair use of another author's work. The fair use doctrine, in short, was originally a fair-competitive-use doctrine, which assumed some economic harm. This latter assumption, of course, makes a mockery of the contention that a commercial use is presumptively an infringement.

FAIRLY COMMERCIAL

The irony of the failure to recognize that in origin fair use was predicated on a commercial use, and thus on the presumption of some economic harm, is made apparent by the parody cases. If any use should be presumed to be a fair use, it is parody, an independent art form. Instead, we have courts relying on a misunderstood copyright doctrine, based on a warped view of copyright and using it to destroy an independent art form rather than to promote learning.

The end of this road, of course, is a copyright-bound literature, and that, indeed, is the goal of copyrightists. The parody decisions -- examples of a small-minded view of fair use generated by the profit potential of new communications technology -- are a step toward that goal.

Eventually, courts will come to see the error of their ways as the social harm resulting from a copyright-bound literature becomes apparent. The U.S. Supreme Court has already rendered a major decision that loosens the bonds of copyright that copyrightists had attached to telephone directories. Feist Publication Inc. v. Rural Telephone Co., 11 S.Ct. 1282 (1991).

There is reason to hope, then, that the court's "Pretty Woman" decision will be a further step in the direction of protecting society against the overreaching claims of copyrightists and giving the doctrine of fair use a rational content.

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DON'T STOP THAT FUNKY BEAT:

THE ESSENTIALITY OF DIGITAL SAMPLING TO RAP MUSIC

Jason Marcus

Introduction

In late summer, 1988, the rap trio The Beastie Boys were set to record their second album, Paul's Boutique, with the help of the innovative production team, The Dust Brothers. The Beastie Boys chose The Dust Brothers because the Brothers had developed a reputation for being masters of "sampling," the cutting-edge technological and funky, fresh force in rap sound. The fresh edge of sampling, which entailed borrowing exact sounds from earlier recorded works, afforded The Beastie Boys a riveting blend of rap, funk, and psychedelic music. There was only one problem.

Sampled artists from the distant past were stirring. Many were beginning to question the use of their music in these brazen new songs. Were the new artists disrespectfully making fun of them? The Beastie Boys, well aware of the rumblings, turned to their attorney, Ken Anderson, for help. Anderson, fully cognizant of possible copyright violations, asked himself what the sampled artists really wanted. He concluded that those artists, usually from the '60s and early '70s, most of all wanted respect and recognition. So Anderson, armed with a list that the trio had compiled of some four hundred samples they wanted to use in the recording process, phoned or wrote each and every sampled artist. He managed to clear each sample, either for a nominal fee or at no cost at all.

Unfortunately, Anderson is the exception and not the rule. Many in the industry do not understand the first thing about the legal and technical ramifications of the burgeoning new art form of digital sampling.

Digital sampling reproduces subsets of an existing sound recording for inclusion into a new sound recording.[1] Once the existing fragment is recorded from analog to digital form,[2] the resulting stream of numbers (representing sonic wave form) can be manipulated in an infinite number of ways, altering some parameters like pitch, while leaving others, such as timbre, intact.[3] The process allows the producer to record a voice or an instrument, either live or from a previous sound recording, and to manipulate it with a computer so that it can be played back at any pitch over the range of a keyboard. Thus, digital sampling allows musicians, producers, and equipment manufacturers to "borrow" other artists' signature instrumental or vocal sounds.[4]

This Note addresses the controversy over appropriation of pre-recorded sound in rap, a musical form that combines rhyming with bits and pieces of music "mixed" together to form the layers of a song. Part I introduces and explains the history of rap music, followed by an exploration of the importance of sampling to rap music as well as its postmodern artistic viability. Next, the legal implications of the Federal Copyright Act[5] (hereinafter "Copyright Act") on the process of digital sampling are explored. This part will describe what is protectable under the Act as well as what exactly constitutes an infringement of a sound recording copyright. This Note then considers whether digital sampling violates the Copyright Act, despite the fact that the technology was non-existent at the time the statute was enacted and amended. Further, this Note offers a variety of factors that point to the inappropriateness of litigating digital sampling disputes. The Note then proposes to resolve the sampling problem through the application of an industry-wide licensing scheme that retains enough flexibility to be situation-specific.

I. History of Rap Music

Rap music existed in practice in the Bronx, New York many years before it entered the mainstream American music scene as "new black American popular music called 'rap.'"[6] The art form was created when local disc jockeys teamed up with "MCs"[7] who provided a show, creating spoken rhymes, catch phrases, and a commentary about the DJ, the clientele, and themselves over the mixed music and drum beats.[8] "Original" sounds were created by "scratching"[9] on a set of two or three turntables.

The music the DJs used in the mid-seventies came from highly obscure and often even secret records.[10] As far back as 19??, rappers known as The Force MD's used scratches to incorporate into their mixes notonly other artists' music but television theme songs such as those from The Brady Bunch, The Addams Family, and F-Troop. The group took taped snippets from the T.V. shows and added them to their beats and rhymes.[11]

In 1979, rap was revolutionized. Two records were released[12] wherein the music appropriated was a remix of Chic's then huge and recognizable disco hit, "Good Times," as the backing track.[13] These releases revolutionized rap because they involved the actual usurpation of previously recorded material, in contrast to DJs who simply had been playing the records at various informal gatherings as the MCs rapped over them, without altering the recording. In regard to the informal earlier ac-

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1. Essentially, the process involves recycling fragments of sound, usually recorded earlier by other musicians. See generally Note, The Copyright Considerations of a New Technological Use of Musical Performance, 11 **Hastings Comm/Ent L.J.** 671 (1988) (authored by Jeffrey Newton); see also Mathews and Pierce, The Computer as a Musical Instrument, **Scientific American**, Feb. 1987, at 126. For a concise and graphic explanation of digital sampling, see Tomsho, As Sampling Revolutionizes Recording, Debate Grows Over Aesthetics, Copyrights, Wall St. J., Nov. 4, 1990, at 1, col. 3.

A sound recording is defined under the Copyright Act at 17 U.S.C. § 101 (1988) as a "work that result[s] from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which [it is] embodied."

Phonorecords are defined by § 101 as "material objects in which sounds...are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term 'phonorecord' includes any material object in which the sounds are first fixed." *Id.*

2. Analog sound is that which is produced through audio tape media, while digital sound is produced by computer, or stored on a computer chip for recall. Analog sound is captured by the use of magnetic tape, on to which air pressure fluctuations are translated into signals which vary the voltage of the electrical current. Thus the tape is encoded. Alternatively, digital recording expresses wave-forms in binary numbers. Electrical signals are translated proportional to voltage, which is stored in the computer's memory. This method is utilized on compact discs, and in digital sampling. See Note, supra note 1, at 672-673.

3. Drake, Digital Sampling: Looming Copyright Problem, UPI, May 8, 1987 (Nexis, omni).

4. Dupler, Digital Sampling: Is it Theft?, **Billboard**, Aug. 2, 1986, at 1, col.3.

5. Copyright Act of 1976, Pub.L.No. 94-553, 90 stat. 2541 (codified as amended at 17 U.S.C. § 101-914 (1988).

6. **D. Toop, The Rap Attack, African Jive to New York Hip-Hop** 8 (1984).

7. "MC" is an abbreviation for master of ceremonies.

8. **Toop**, supra note 6, at 15.

9. Scratching is a technique wherein the DJ manipulates the needle of a record that is playing, creating an audible sensation. It has been referred to as "the endless high speed collaging of musical fragments." Id. at 18.

10. Id. at 15.

11. Id. at 26.

12. There is some debate in the industry as to which record came first, but the general consensus is that the first record was by a Brooklyn based group called Fatback with a DJ called Big Tim III, recording on the Spring label. This was followed by the "granddaddy" of rap records, "Rapper's Delight" by The Sugarhill Gang on Sugarhill Records. Id. at 15-16.

tivity, Afrika Bambatta, then a DJ in The Bronx, now aprominent rap recording artist said:

> *...I used to play the weirdest stuff at a party. . . . I would throw a commercial* [into the mix] *to cool them out, and then I would play 'Honky Tonk Woman' by the Rolling Stones and just keep the beat going. I'd play something from metal rock records like Grand Funk Railroad. 'Inside Looking Out' is just the bass and drumming... rrrmmmmmmm...and everybody starts freaking out.*[14]

At that point there was no copyright problem due to the noncommercial medium in which rap existed.[15] "Rap was a performance medium: It was a throw back to the days when musicians made singles approximating their live shows."[16]

Until 1979, the sole documentation of Bronx hip–hop was cassette tapes. These tapes were either clandestine tapes made by would–be bootleggers at parties or tapes made by groups themselves and distributed to friends.[17] However, as soon as these records were released, a direct conflict arose between this practice and the traditional protections of the Copyright Act of 1909 as amended in 1976.[18] As one author comments: "The concurrent fashionability of scratch mixing and sampling keyboards like the Emulator and Fairlight has led to creative pillage on a grand scale and caused a crisis for pre–computer–age concepts of artistic property."[19] Further, the advent of the inexpensive and easy to use sampling keyboards provided rap artists withincredible electronic musical power at their fingertips.[20] It is in this environment that the debate arose over whether sampling through record scratching and tape loops for use on a new recording constituted copyright infringement. The controversy has shaken the legal and musical communities, gaining ever–increasing attention since the technology was first popularized several years ago.[21] The widespread and now routine use by rappers of myriad samples of varying length in their recordings demands that the legality of the practice be addressed. If sampling is found to violate the Act, alternatives to ensure the life of this ever–evolving art form must be considered and implemented.

II. Sampling as a Postmodern Art Form

Digital sampling expresses postmodernism today in much the same sense as Andy Warhol's canvases of Campbell's soup cans did in the 1960s. Both methods of artistic expression involve the re–interpretation of previously documented media in a novel setting. The re–use of existing material in a new social, political, and intellectual context is a feature of many forms of postmodern arts practice.[22] For example, a visual artist may attach an old tire to an otherwise one dimensional painting. Such artistic manipulation has been referred to as "deconstruction" or "recontextualization."[23] This socially poignant process forces the listener to question and rethink commercial presentation and materialism in society. However, despite the importance of forging new methods of perception and analysis, rap music seems to be a ripe area for indirect censorship through the use of the Copyright Act, perhaps due to the brazen openness of the taking in some circumstances.[24]

Many pro–artist advocates involved in the ongoing sampling debate feel that all new music comes from old music in some way. They claim that the "American way" is to err on the side of artistic freedom.[25] This premise has been accorded respect in the Anglo–American judicial system by the venerable Justice Story, who stated in Emerson v. Davies[26]:

> *In truth, in literature, in science and in art, there are and can be few, if any things which, in an abstract sense, are strictly new and original throughout. . . . [E]ven Shakespeare and Milton, so justly and proudly our boast as the brightest originals would be found to have gathered much from the abundant stores of current knowledge and classical studies in their days.*[27]

Justice Story recognized the inevitability of allowing some creative overlap in order to preserve the vitality of such forms of expression.

Aside from advocating postmodern expression, there is another, and perhaps more important reason for promoting the use of sampling in rap music. Through the medium many artists pay homage to the strong roots of black American music. "There is a shared black pop classicism in rappers, many of whom look to the late 1960s and early 1970s, particularly to Jimi Hendrix, Parliament–Funkadelic, Sly Stone, Marvin Gaye, James Brown, and Bob Marley for both musical and spiritual inspiration."[28] Rappers are able to affirm and carry on the historical sounds of those artists by weaving them into new arrangements. One commentator argues that it makes sense that during this time of racial embattlement, black musicians are looking back to the civil rights era for musical inspiration.[29] These musicians hark back to a richer, more soulful era.[30]

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13. Id. at 15–16. The music from the Chic song was essentially all the music for the two records discussed supra note 12. The "originality" was provided by scratching and other assorted special effects. Id. "Sampling has been a natural avenue for rappers since the style began with artists creating their own lyrics to the accompaniment of cassette tapes of songs or skeletal rhythm tracks. In some respects rappers were 'sampling' before the term existed since many early hits in the genre were built around the bass line to 'Good Times' by Chic." Snowden, Sampling. A Creative Tool or License to Steal?, Los Angeles Times, Aug. 6, 1989, Calendar at 61, col. 1.

14. **D. Toop,** supra note 6, at 65–66.

15. 17 U.S.C. § 114 operates to limit the penumbra of basic rights afforded the owner of a copyright. Specifically, performance and reproduction rights are limited. § 114 makes it textually clear that there exists no performance right as such in a sound recording. The user must satisfy clearance requirements with either BMI or ASCAP. Both of those artist protection agencies require that a DJ at a club, for example, have a license for the songs that he performs on any given evening. These licenses are obtained easily and for nominal fees, thus keeping such "performance" outside the realm of copyright law. Thus copyright owners may not sue licensed users for performance that is done for a profit at a nightclub. See Goldstein v. California, 412 U.S. 546 (1973); see also Capitol Records Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955). The case of Sony Corp. of America v. Universal Studios Inc., 464 U.S. 417 (1984), is particularly illustrative of the above distinction between commercial and noncommercial performance, as well as the copyrightability of performance. In Sony the Court had to decide whether making unauthorized videotapes of television shows and motion pictures for the purpose of viewing them at home at a more convenient time (time shifting) was a copyright infringement. The Court, per Justice Stevens, held that such use was fair under 17 U.S.C. § 107 because it was a noncommercial, nonprofit activity which plaintiff failed to prove would adversely affect the potential market for the copyrighted work. Id. at 793–795. By analogy, Bambatta's use of a song by the Rolling Stones at a party could hardly be said to detract from the commercial value of the copyrighted song.

16. **D. Toop,** supra note 6, at 93.

17. Id. at 78.

18. Amended in 1976 as 17 U.S.C. § 101–914, **H.R. Rep.** No. 487, 92d Cong., 1st Sess. 7 (1971) (codified as amended at 17 U.S.C. § 101–914, 1976, [current version at 1988]).

19. **D. Toop,** supra note 6, at 153.

20. Sampling is relatively easy for the average person. All a musician has to do is record into the sampling device an isolated sound from an analog source and then reproduce that sound on his own recording. See Dupler, supra note 4, at 1, col.3.

21. Soocher, License to Sample, National Law Journal, Feb. 13, 1989 at 1, col. 2.

22. See Simpson, Two Aspects of Sampling in the Music Industry, 65 **Australian L.J.**, 771, 771 (1989).

23. Id. at 771.

24. See infra text accompanying notes 104–112.

25. Ken Anderson, lawyer for The Beastie Boys and Tommy Boy Records, feels as though the practice should be hailed as artistic expression. See J.D. Considine and J. Ressner, Larcenous Art? Digital Sampling in the Recording Industry, **Rolling Stone**, June 14, 1990, at 103.

26. 8 F. Cas. 615 (C.C.D. Mass. 1845)(No. 4, 436).

27. Id. at 619.

28. See A New Bag For Hip–Hop, New York Newsday, Apr. 19, 1990 Part II, 11.

29. Id. (quoting jazz drummer Max Roach). This can also be seen in rapper's utilization of snippets of speeches by Martin Luther King and Malcolm X. See Public Enemy, Fear of a Black Planet, Def Jam/Columbia Records, 1990; see also Paris, The Devil Made Me Do It, Tommy Boy Records, 1990.

III. The Copyright Act and Its Violations

A. What is Protectable?

The basic requirements for copyrightability are set forth in section 102(a) of the Copyright Act:

> *Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.*[31]

As such, the Copyright Act requires originality and fixation in order to obtain a copyright, and specifically denies protection to "idea[s], procedure[s], . . . or discovery . . . "[32]

Authorship under section 102(a) has been defined by courts to describe the "creator of that work."[33] The section further provides that a copyright comes into existence by the affirmative act of the author fixing his or her work in a tangible medium of expression.[34] A work is considered to have been placed in a tangible medium of expression when it "has been placed in a relatively stable and permanent embodiment. In effect it must be recorded or written in some manner."[35] This requirement must be met by the individual author, or by one authorized by the author.[36]

In order to claim copyright, the author's creation must be an original work of authorship.[37] Basically, an original work is one that is not copied from another work.[38] In the aural medium, it has been argued that each person's vocalization of a word, note or creation of another sound is an original expression subject to copyright protection, if duly fixed in a phonorecord.[39] As such, the spectrum of what will be deemed "original" sound is certainly broad, possibly even including a single note.[40]

The work seeking copyright must fall under the Copyright Act's definition of a work of authorship. Sound recordings qualify as works of authorship.[41]

The standard against which a work shall be judged to be "of authorship" has been referred to as a de minimis one.[42] Nearly all distinguishable variations from existing works will constitute sufficient indicia of originality for authorship to attach.[43] As such, a sampler may argue that he contributed authorship and thus did not violate the Copyright Act.

Courts have cautioned that creative authorship should not be judged by a standard of artistic merit. In Bleistein v. Donaldson Lithograhing Co.,[44] Justice Holmes stated that judges should not substitute their own views of what consists of artistic merit when deciding questions of authorship. "It would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[45]

Provided that they satisfy the above requirements of originality and authorship, sound recordings are copyrightable as fixed in a tangible medium; a tape, disk, or phonorecord.[46] The Copyright Act explicitly separates the sound recording from the material object in which it is embodied. It is the recording itself that is the tangible medium of expression that is the subject of copyright.[47]

The Copyright Act sets forth requirements that must be met to claim copyright in a sound.[48] First, the sound must "result from the fixation of a series of musical, spoken, or other sounds."[49] Second, the sound must be "fixed by any method now known or later developed" in a 'phonorecord' from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[50] Third, the sound must have been fixed in a phonorecord on or after February 15, 1972.[51] Lastly, the sound must be "original." [52]

B. Infringement

The traditional test of infringement of copyright requires proof of ownership of the copyright and copying.[53] The determination of ownership includes the issues of originality and copyrightability, i.e., is the work itself copyrightable? Copying is generally proven by establishing access and substantial similarity between the two works.[54]

A plaintiff can prove access by a showing that the defendant had a reasonable opportunity to see or copy the work in question. Access is a question for the jury, with the standard of "reasonable probability" of access as the threshold under which access is presumed absent.[55]

Substantial similarity refers to the level of similarity between the plaintiff's work and the allegedly infringing work. In order to understand the concept of substantial similarity and its application to the digital sampling question, the Copyright Act itself must be textually examined.

Infringement, as defined by Congress, results whenever "all or any substantial portion of the actual sounds that go to make up a copyrighted recording are reproduced."[56] While substantial similarity is an essential element of a case to prove copying,[57] the actual determination of whether or not a work is substantially similar to a copyrighted work has puzzled many legal scholars. In Nichols v. Universal Pictures Corp.[58] Judge Learned Hand recognized that the line of similarity" wherever drawn will seem arbitrary."[59] The context of sampling appears to afford no further insight into a definition of substantial similarity, particularly due to the computerized alteration and sometimes unrecognizable dissemination of the original work by the sampler.

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30. See A New Bag For Hip-Hop, supra note 27, at 11. Public Enemy coproducer Keith Shocklee defends sampling old records by arguing that today's musicians cannot play soulfully. Id.

31. 17 U.S.C. § 102(a) (1988).

32. 17 U.S.C. § 102(b) (1988).

33. See Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58 (1884).

34. 17 U.S.C. § 102 (a) (1988).

35. **M. Leaffer, Understanding Copyright Law**, 31 (1990).

36. **H.R. Rep.** No. 94-1476, 94th Cong., 2d Sess. 53 (1976).

37. This standard of originality is not textually apparent in § 102 (a). This is due to the fact that the Copyright Act intended to incorporate the standard of originality as established under the 1909 Act. **H.R. Rep.** No. 94-1476, 94th Cong., 2d Sess. 51 (1976).

38. **M. Leaffer**, supra note 35, at 35.

39. See generally Comment, Digital Sampling: Old-Fashioned Piracy Dressed up in Sleek New Technology, 8 Loy. Ent L.J., 297 (1988) (authored by J.C. Thom).

40. Professor Melville Nimmer states "[T]hough the answer is not entirely without doubt, it would seem that any instrumental performance, or vocal rendition, contains something which is irreducible, and thus may be the subject of copyright." 1 **M. Nimmer on Copyright** § 2.10[A] at 2-145, 146 (1989).

41. Works of authorship under 17 U.S.C. § 102(a) include: "(1) literary works; (2) musical works; (3) dramatic works; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; and (7) sound recordings. Id. This list is not exclusive.

42. **M. Leaffer**, supra note 35, at 36.

43. Id.

44. 188 U.S. 239 (1903).

45. Id. at 251.

46. See explanation of the term phonorecord, supra note 1.

47. 17 U.S.C. § 101 (1988).

48. Sounds specifically are addressed by 17 U.S.C. § 114, also known as the Sound recording Act. This was first proposed as the sound recording amendment of 1971. It was passed in order to "provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording[s]. Prohibiting Piracy of Sound Recordings, **H.R. Rep.** No. 92-487, 92d Cong., 1st Sess. (1971). The amendment was needed to stop the "widespread unauthorized reproduction of phonograph records and tapes" brought on by the development of audio cassette tapes. Id. See Comment, supra note 39, at 300 n.9.

49. 17 U.S.C. § 101 (1988).

50. Id.

51. 17 U.S.C. § 301(c) (1988).

52. 17 U.S.C. § 102(a) (1988). See **M. Nimmer**, supra note 40, at § 2.10[A].

53. **M. Nimmer**, supra note 40, at § 13.01.

54. See Pasich, Are Samplers Fair Users or Pirates? Los Angeles Daily Journal, Feb. 16, 1990, at 1.

55. **M. Leaffer**, supra note 35, at 266-67.

56. **H.R. Rep.** No. 1476, 94th Cong., 2d Sess. 52 (1976). See Note supra note 1, at 706.

57. **M. Nimmer**, supra note 40, at § 13.03[A]

58. 45 F.2d 119 (2d Cir. 1930).

59. Id. at 122.

The issue of substantial similarity raises a number of questions in sound recording cases.[60] Many of these questions were addressed in United States v. Taxe[61] wherein the defendant rerecorded music from records and tapes, adding new sounds and changing speed, reverberation, and volume. The court used the test of substantial similarity to hold that defendant's "piracy" had indeed infringed plaintiff's copyright.[62] However, the court failed to explain how the substantial similarity test should be applied in the sound recording context. As such, there appears to be some degree of confusion in the courts on the issue.[63] A digital sample is almost a *per se* admission of "similarity" in the sense that it is indeed the actual sound that is being appropriated. Thus, the Taxe court would probably leave the question of appropriation to the trier of fact, with the only instruction being to determine whether or not the defendant had indeed utilized the "actual" sound of the plaintiff, as pronounced in section 114(b) of the Copyright Act.[64]

Law review writers have generally argued that digital sampling is directly in violation of section 114(b) of the Copyright Act and thus should be halted by instituting legal proceedings.[65] The logic behind these arguments is essentially that section 114(b), by the inclusion of the word "actual," expressly prohibits lifting the exact sound of a copyrighted work.[66]

Although digital sampling involves taking the exact sound, artists will often filter the sound, scratch it up, or further manipulate it until it is unrecognizable as the original sound. Also, if one takes into consideration the technological possibilities of digital sampling, there may be instances when there is a quantum of sound so *de minimis* that it may be taken from a sound recording without violating existing copyright laws.[67] This issue has not been addressed by any court or statute; however, the Taxe court surmised in dicta that a trivial rerecording might be such an insubstantial taking as not to infringe. It can be inferred from the opinion that the taking of a few notes may be without merit, and thus not necessarily copyrightable.[68]

Finally, there appears to be a dichotomy in section 114 of the Copyright Act between rerecordation, which is protectable, and mere imitation, which is not.[69] Some have argued that digital sampling is more imitative than duplicative because of the fact that samples are generally altered and as such not re-recorded verbatim.[70] It has been further argued that the above distinction reflects the legislative intent that the originality of a recording artist is mainly what is to be protected.[71] If it is accepted that sampling is different from mere re-recordation, then it follows that sampling affords the modern musician a valuable tool for artistic expression and, accordingly, is not proscribed under the Copyright Act.[72]

In any event, it appears to be an important legislative intention to balance the rights held by the owner of the copyright with the right of the public to create new works.[73] This should logically extend to sound recordings as they are defined by the Copyright Act as works.[74] As the Supreme Court stated in Twentieth Century v. Aiken:[75]

> *The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to serve a fair return for an "author's" creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good.*[76]

Thus, recognizing rap sampling as contributing significantly to the public interest, as well as allowing creative expression, should affect the above balance of interests in favor of unrestricted expression.

C. Applying High Tech to Low Tech Law

The Supreme Court, in Sony Corp. of America v. Universal City Studios Inc.,[77] recognized the inherent interplay between technological advancements and copyright law:

> *From its beginning the law of copyright has developed in response to significant changes in technology.*[78] *[F]or example, the development and marketing of player pianos and perforated rolls of music...preceded the enactment of the Copyright Act of 1909; [and] innovations in copying techniques gave rise to the statutory exemption for library copying embodied in section 108 of the 1976 revision of the Copyright Act.*[79]

Justice Stevens explains that it was the in-

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60. A finding of substantial similarity is merely an evidentiary device to allow an inference of copying. **American Bar Association, Committee Reports, Section of Patent, Trademark, and Copyright Law** § 306-B-1, 90:160 [hereinafter **ABA Committee Report**]. See Snowden supra note 13, at 61, col. 4. " 'Copyright infringement is a strange area because there's no set amount of timing of music that constitutes a violation,' said Richard Grabel, a New York music attorney and former rock critic. 'The basic legal standard is substantial similarity...there's a threshold and if you cross it, bang, you're guilty. If you stay just shy of that threshold, you're using the common language of pop music.'" Id at 61, col. 4.

61. 540 F.2d 961 (9th Cir. 1976); U.S. Cert. den. 429 U.S. 1040; U.S. Reh. Den. 429 U.S. 1124.

62. Id. at 965.

63. See generally Note, Digital Sound Sampling, Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds, 87 **Colum. L. Rev.** 1723 (1987) (authored by Bruce J. McGiverin) see also Comment, supra note 39. Even professor Nimmer, in his discussion of the application of the substantial similarity test, does not explain how it should be applied in sound recording cases as opposed to cases dealing with written media. **M. Nimmer**, supra note 39 at § 13.03 (1989).

64. Telephone Interview with Ken Anderson, associate at Berger and Steingut, New York City, and attorney for The Beastie Boys and Tommy Boy Records, Nov. 10, 1990.

65. See generally Note, The Substantial Similarity Test and its Use in Determining Copyright Infringement Through Digital Sampling, 16 **Rutgers Computer and Technology L.J.** 509 (1990) (authored by Maura Giannini); see also Note: Digital Sound Sampling Copyright and Publicity: Protecting Against the Electronic Appropriation of Sounds, supra note 62 see also Comment, You Can't Always Get What You Want But Digital Sampling Can Get What You Need, 22 **Akron L. Rev.** 691 (1989) (authored by Ronald Mark Wells).

66. 17 U.S.C. § 114(b) reads in pertinent part: "The exclusive right of the owner of a copyright in a sound recording . . . is limited to the right to duplicate that sound recording in the form of phonorecords . . . that directly or indirectly capture the actual sounds fixed in the recording." (Emphasis added.)

67. See U.S. v. Taxe, 540 F.2d 961 (9th Cir. 1976) One commentator feels that Taxe, although holding against record pirates, ruled that the issue of literal copying will not be held to be an automatic infringement as the copying under Taxe must be substantially similar to the original recording as a whole. As such the case can be interpreted as recognizing that certain snippets will be held de minimis. Telephone interview with Ken Anderson, supra note 64.

68. U.S. v. Taxe, 540 F.2d at 965. "We beleive the [jury] instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to condider 'substantial similarity." Id. The fact that defendant in Taxe was a seller of pirated records explains why the court did not inquire into whether defendant's works were mere unprotecatble imitations because defendant had clearly re-recorded substantially qualitative copyrighted works verbatim.

69. Id. at 965, n.2. See generally Comment, Digital Sampling and Signature Sound, 61 **U. Miami Ent. & Sp. L. Rev**, Spring 1989 at 71-74 (authored by Thomas Arn).

70. See Comment, supra note 69, at 71-74.

71. Id. at 80.

72. Id. at 81. The author further argues that even if sampling is found to be re-recordation, query whether it is a substantial taking under Taxe, Id. at 83. Professor Nimmer further assesses the distinction between actual and imitated sounds in **M. Nimmer**, supra note 40, § 2.01[A] at 9.

73. "[It is the] balanced purpose of the Copyright Act [to] assure the composer an adequate return for the value of his composition while at the same time protecting the public from opressive monopolies." Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 151 (1975).

74. 17 U.S.C. § 101 (1988).

75. 422 U.S. 151 (1975).

76. Id. at 156.

77. 464 U.S. 417 (1984).

78. Id. at 430.

79. Id. at 430, n.11.

vention of a new form of copying, the printing press, that gave rise to the original need for copyright protection.[80] "Repeatedly, as new developments have occurred in this country, it has been the Congress that has fashioned the new rules that new technology made necessary."[81] Stevens recognized, however, the inherent inability of the legislature to predict future advancements.

The Copyright Act was first promulgated by Congress in 1909. When enacted, the legislature intended the Act to apply to situations and artistic mediums then in existence, which it could adequately address.[82] This inability to foresee future innovations was not without its shortcomings. As technology marched forward, many disputes arose raising questions about the applicability and/or staleness of the Act to novel situations. For example, in a 1968 case, Fortnightly Corp. v. United Artists Telivsion,[83] involving the use of alternative cable systems to receive basic television stations in hilly West Virginia,[84] the Supreme Court stated, in reference to the then pertinent Act of 1909:

> *Our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory-language of 60 years ago in light of drastic technological change.*[85]

The Supreme Court recognized in Fortnightly that any statutory analysis regarding a technological advancement would require a consideration of the potential inappropriateness of strict statutory construction.[86]

Similarly, in Goldstein v. California,[87] the Court cautioned against statutory analysis that did not adequately address rapid technological change:

> *To interpret accurately Congress' intended purpose in passing the 1909 Act and the meaning of the House Report...we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the House Report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909 in which they were written.*[88]

Relaxing the literal terms of the Act in response to technological changes appears to be a necessary step for any judiciary when dealing with a process that could not have been portended by an acting body of law makers. "When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of...[its] basic purpose."[89] The modern surge in communications and information recordation has produced doctrinal tensions in copyright law that are likely to increase in the near future. Consequently, copyright law is becoming unmanageable for both copyright owners and the public.

Digital sampling is a relatively recent phenomenon, not appearing until several years after the passage of the 1976 revision of the Copyright Act. As explained in Part I, rappers used techniques such as scratching and rapping over copyrighted records long before the advent of digital sampling.[90] Once sampling keyboards were introduced in the early eighties it became apparent to many rappers that the keyboards could be used to accelerate the recording process as well as open up whole new avenues of sound.[91] In adopting the machines as part and parcel of their recording process, rappers hardly realized that they were testing the applicability of the Act to the recently developed digital sampler.

Attorney Ken Anderson, who represents Rap artists such as The Beastie Boys and De La Soul, feels that there is no such thing as "predictive legislative intent"[92] in the law of copyright. Mr. Anderson believes that new technologies such as digital sampling are inapplicable to statutory copyright legislation and should, therefore, be dealt with by other means.[93]

Record producer Arif Mardin states: "You can't stop technology.... It moves too fast and the laws don't keep up. Some people still don't understand exactly what sampling is, and maybe new laws will have to wait until there is a greater awareness."[94] Even the ABA Committee on Broadcasting, Recording, and Performing Artists stated that "[t]he lack of case law specifically addressing the issues [of digital sampling] and the increasing use of digital technology in the sound recording industry presents [sic] a situation that would benefit from clarifying legislation."[95]

A clarification in the legislation would update the Copyright Act[96] so that it would apply to digital sampling. However, as it exists today, the Act does not apply to sampling. One commentator suggests, "[s]ound sampling is the epitome of technology trying to squeeze into copyright law where it just does not fit."[97]

As it stands the practice of sampling has crossed the actionable boundary of the revised Act and as such must be dealt with either by a clarification in legislation or by some method other than litigation. Eric Greenspan, attorney for many rappers, including Stetsasonic, argues that "[t]he Copyright Act never considered sampling...[w]hat we are trying to do is interpret old laws under new circumstances. The problem is that technology is growing faster than lawyers and managers can react."[98]

Thus, if digital sampling cases get as far as a courtroom, it appears inappropriate that to apply the current section 114(b) of the Copyright Act. However, as the next Part of this Note details, cases involving sampling are either being settled or not pursued, for a variety of reasons. Thus applicability of the Act has not been tested in a digital sampling case.

IV. Sampling Cases Are Not Reaching the Courtroom

A. Many in the recording industry are reluctant to litigate

Sampled artists and their representatives–usually their publisher or record company–have been reluctant to bring suits against samplers for a variety of reasons. Record companies that represent sampled artists worry about one day being sued themselves, and attorneys that represent companies and their sampled artists realize that an unfortunate precedent may be set if a court decides to rule either that the taking was de minimis or represented a fair use. If the latter, loss of value to the sampled artist will be difficult to prove.[99] It is likely that a judicial decision in the area would oper-

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80. Id.

81. Id. at 430–31.

82. **1 N. Henry, Copyright, Congress, and Technology: The Public Record. Introduction** xvi (1978).

83. 392 U.S. 390; reh den. 393 U.S. 902 (1968).

84. Fortnightly Corp. v. United Artists Television, 392 U.S. 391–92.

85. Id. at 395–396.

86. Id.

87. 412 U.S. 546 (1972); reh den. 414 U.S. 883 (1973).

88. Id. at 564. See also the dissent of Gibbons, J. in Jondora Music Publishing Co. v. Melody Recordings Inc. 506 F.2d 392, 397–401 (3rd Cir. 1974), cert. den. 421 U.S. 1012 (1975).

89. Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 156 (1975). The basic purpose referred to in the case is to "stimulate artistic creativity for general public good," Id.; which essentially is consistent with the framer's intention to "promote science and the useful arts." **U.S. Const.** art. 1, § 8, cl.8.

90. See supra notes 6–21 and accompanying text.

91. See **Toop**, supra note 6, at 156.

92. Telephone Interview with Ken Anderson, supra note 64.

93. Id. Mr. Anderson feels as though some sort of licensing scheme would be the best method of dealing with the myriad conflicts that are arising in this area. See infra Part V.

94. Dupler, supra note 4, at 74, col. 1.

95. **ABA Committee Report**, supra note 60, at 164.

96. Specifically § 114(b), as would be applicable to digital sampling disputes. As the section stands now it is restrictive as well as ambiguous in the use of the word "actual" in relation to what is copyrightable. As explained in the text infra this is due to the inability of the legislature to portend future technological advancements, however, now that sampling has become a major issue it may benifit from some congressional clarification.

97. Digital Sampling, Cheered, Jeered, Chicago Tribune, Oct. 23, 1986, Tempo, at 10 (quoting William Krasilovsky, a lawyer and co-author of **The Business of Music**).

98. J.D. Considine and J. Ressner, supra note 25, at 103 col. 2.

ate in a vacuum, offering no guidelines for artists and their representatives.

In the music world today it is increasingly apparent that the axiom "today's plaintiff may be tomorrow's defendant" is a reality in regard to digital samplers. Copyright owners of sound recordings are not claiming their legal remedy against samplers. This phenomenon can be attributed to several factors. A company that itself has artists under contract who sample, aside from the possibility of having to overcome a defense of "unclean hands" in a sampling action, is unlikely to sue another record label whose copyrights it may want to use in the future.[100] While this decision not to enforce artist's copyrights based on a large scale corporate financial decision may be inherently unfair to the sampled artist, the reality is that record companies are attempting to be cost effective and are advising against enforcement of rights because they do not wish to be sued by other such situated companies.[101]

Attorney Lionel Sobel, editor of The Entertainment Law Reporter, believes that companies are motivated to steer clear of actual litigation because they themselves currently have artists under contract who are sampling.[102] Thus, record companies are generally avoiding what would be a rather expensive "vicious circle." Rather than sue each other continually, companies appear to have chosen not to pursue litigation.[103]

A few cases have been brought despite the above considerations. Those cases have settled rather quickly, however. Rappers De La Soul[104] appropriated part of "You Showed Me," a top ten hit by The Turtles in 1969,[105] and used it as a tape loop, replaying segments for more than a minute.[106] Mark Volman, Turtles vocalist, heard the song as it was reworked into De La Soul's "Transmitting Live From Mars."[107] Volman sued De La Soul and their label, Tommy Boy, for $1.7 million, claiming that the defendants had knowingly used the sample without authorization and thus violated his copyright.[108] The suit was settled immediately for an undisclosed amount.[109]

In other actions, the Beastie Boys and their label Def Jam[110] were sued by artist Jimmy Castor over the alleged use of Castor's material from the mid– 1970's. The Beastie Boys, represented by Ken Anderson, admitted the takings in the action against Castor as well as another action, yet both cases were settled well before projected trial dates.[111] Mr. Anderson believes that both sides felt that pursuit of the matter in the courts was the least cost effective alternative the parties faced.[112]

B. Fair Use

In general, a sampler would prefer not to risk a case that would make some uses impossible or increase licensing costs.[113] Under the fair use doctrine,[114] however, he may be able to sample without taking these risks. If the doctrine is found applicable by a court, owners of sampled material would lose a large portion of revenue.[115]

Under the fair use doctrine, a fair use of a copyrighted work is permitted without the owner's consent, because the use does not detract from the copyrighted work's value or unfairly compete with that work. The doctrine is flexible and "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity that the law was designed to foster."[116] In determining whether the use is fair, courts consider various factors, including those expressly stated in the Act in section 107.[117]

The first factor considered is the purpose and nature of the use. This essentially involves a commercial/noncommercial determination [before 1994]. A commercial use negates a finding of fair use because it will presumptively capitalize on the copyrighted work. Commercial use is not, however, fatal to a fair use defense.[118] Second, courts consider the nature of the disputed work in order to determine whether the use is creative rather than informative. Third, a court will consider the amount and substantiality of the portion used (sampled, in our case). This test is qualitative as well as quantitative.[119] In other words, a sample may be substantial even if short,[120] or conversely, insubstantial even if long.

Last, and perhaps most applicable to the sampling debate, section 107 calls for courts to consider the likely effect that the use of the copyrighted material will have on the potential market for, or the value of, the copyrighted work.[121] A court will likely consider this to be the most important factor in determining if the use is fair.[122] This factor may serve as a deterrent to litigation because it would be hard for a prospective plaintiff, such as The Turtles, to claim that the value of their original 1969 hit[123] was diminished by the sampler's use of it twenty years later. In fact, the sampler may actually add to the value of the original work because he has exposed it to a wider market, or rekindled interest in it, prompting additional purchases.

The recognition by the [Supreme] Court in Harper and Row Publishers Inc. v. Nation En-

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99. Zimmerman, Old Is New Again in the World of Sampling, Variety, Aug. 1st, 1990, at 69, col.3.

100. S. Gordon and C. Sanders, Roadblocks to Legal Protection in Sampling, New York Law Journal, May 19, 1989 at 5, col. 1.

101. Id.

102. Tomsho, supra note 1, at B4, col. 3.

103. See Gordon & Sanders, supra note 100, at 5, col. 1.

104. The group De La Soul is represented by Tommy Boy Records. The group's "critically acclaimed gold album, Three Feet High and Rising has been hailed as a watershed in the creative use of sampling. The first side alone contained pieces of TV game show themes and the Steely Dan song "Peg," James Brown rhythm tracks and hard rock guitar licks, the "Chopsticks" theme, and what could be the bass line to 'Stand By Me'– along with literally dozens of other snippets that are maddeningly familiar but difficult to identify." See Snowden, supra note 13, at 61 col. 1.

105. See J.D. Considine and J. Ressner supra note 25, at 103.

106. De La Soul used a four bar section of the Turtles' song (lasting twelve seconds) and "looped" it so that the riff served as the music for the entire 66 seconds of the De La Soul song. See Snowden, supra note 13, at 61, col. 2.

107. The song appeared on De La Soul's album Three Feet High and Rising.

108. Volman, who sued as "Flo and Eddie Inc.," actually used the California equivalent of the Sound Recording Act, Cal. Civ. Code § 980(a)(2), which provides that the "author of sound recording has exclusive ownership." Id.

109. See Tomsho supra note 1, at B4, col. 2.

110. Def Jam was Rick Rubin's label which has now split, with Rubin taking the name Def American. The Beastie Boys have since had disagreements with Rubin and signed with Warner Brothers, but the samples in question were contained on Licensed to Ill, an album released by Def Jam in 1986. Telephone interview with Jennifer Murillo, assistant publicist at Def American Records, Los Angeles California, April 26, 1991.

111. See Castor v. Rubin, 87 Civ. 6159, and Thomas v. Diamond, 87 Civ. 7048, both Manhattan federal district court cases.

112. See Telephone interview with Ken Anderson, supra note 64, see also Zimmerman, supra note 99, at 69, col.3–4. "Larry Stanley, director of business affairs at Tommy Boy . . . agrees, saying the whole situation is about negotiation power. 'The plaintiffs are afraid because they could lose their muscle. They can use their copyright for negotiating power and threaten to sue, and they could win a big judgment of treble damages. But the court might say that three or four bars from a song is not enough [to establish infringement]. . . . [The defendant] might take the stance of 'we're only sampling half a bar or three notes, so sue us.' The judge might say that those three notes are enough and then the defendant has no negotiating power.'" Id. at 69, col. 3.

113. See infra Part V on licensing of samples.

114. Fair use is set forth in 17 U.S.C. § 107 (1988).

115. See Zimmerman, supra note 99, at 69, col. 4.

116. Iowa State University Research Found. v. American Brdcst Corp., 621 F.2d 57, 60 (2d Cir. 1980).

117. 17 U.S.C. § 107, (1988).

118. M. Nimmer supra note 40, § 13.05[A], at 72–73.

119. See Pasich, supra note 54, at 7, col. 2.

120. Id.

121. See 17 U.S.C. § 107 (1988), (last fair use factor consideration).

122. "Finally the Act focuses on last the effect of the use upon the potential market for or value of the copyrighted work. This factor is undoubtedly the single most important element of fair use." Harper & Row Publishers, Inc. v. Nation Enter. 471 U.S. 539, 566 (1985).

123. Most samples are taken from rock or funk records from the mid 60's to the mid 70's. However, there has been an increasing trend of rappers sampling each other. See generally J.D. Considine and J.Ressner, supra note 25.

terprises[124] that the fourth factor will be the most important consideration to users[125] (samplers), does not, in and of itself, absolve a rapper defendant from satisfying the other factors of a fair use defense. Author J.S. Lawrence, however, in an extensive treatise on fair use,[126] argues that "two of the tests of fair use, the substantiality of the copying, and the commercial/noncommercial dichotomy do not function well for non-literary media."[127] Lawrence further argues that

> *"the fairest and most satisfying approach to the problem* [of fair use] *is the one inherent in the Copyright Clause of the Constitution[128] which states that thepurpose of the copyright law is to '[P]romote the [P]rogress of [S]cience and the useful [A]rts.'"[129]*

Lawrence believes that the test of fair use is faulty. Ideally, it should take into account factors other than the commercial quality of the use.[130] This proposed change favors the sampler by removing the commercial gain factor, which may defeat a fair use defense. Lawrence argues that courts, in passing upon particular claims of infringement, must occasionally subordinate the copyright holder's interest in being protected to the greater public interest in "advancement and development of the arts."[131] The author proposes a radical alteration of section 107. The proposed alteration would inquire whether the artist (sampler) is "within a class of persons engaged in the advancement of . . . the arts . . . or ideas deserving first amendment protection,"[132] and balance that concern against the effect on the copyrighted artist's work. Under the proposed test, a court would inquire whether the copier (sampler) stands to substantially profit from the use. If the court decides that there should be some compensation, it will not be in the traditional form of inflated money damages, but rather it will exist as a license, with nominal payment according to the amount of work absconded.[133]

124. 471 U.S. 539 (1985).

125. Id. at 566.

126. **2 J.S. Lawrence & B.Timberg, Fair Use and Free Inquiry (1989).**

127. Id. at 317.

128. **U.S. Const. art. 1, § 8, cl. 8.**

129. **2 J.S. Lawrence and B.Timberg,** supra note 126, at 317. The authors explain: "[T]o say that copyright owners are generally entitled to a reward for their labors does not mean that they are entitled to the kind of reward that would frustrate the constitutional purpose to promote the progress of science and the useful arts." Id. at 318.

130. Id. at 317.

131. Id. at 318. See also Berlin v. E.C. Publications Inc., 329 F.2d 541, 544 (2d Cir. 1964).

132. **2 J.S. Lawrence and B. Timberg,** supra note 126, at 319.

133. Id. at 319. Here Lawrence speaks of "appropriate" provisions for the payment of copyright royalties.

V. Proposal: A Voluntary and Cooperative Scheme for Licensing with Negotiation Guidelines

A. Considerations and Examples of the Sampling Problem

The dilemmas outlined above point to the fact that the music industry must find some method of dealing with the widespread use of digital sampling. That solution will no doubt be found outside the realm of the statutory law as it exists today. Rather, both parties to these disputes, the sampled and the sampler, must come together in a cooperative spirit and resolve these disputes. This will result in a reduction of legal costs for both parties. Also, the animosity that can so easily develop in a context such as digital sampling due to the appropriation of sound without credit, can be eliminated.

As noted above, one of the crucial elements involved in a fair use analysis is the determination of whether the "infringing" artist stands to profit from the use of a copyrighted work. Commentators[134] are in accord that the determination of profit should be linked to the determination of payment. However, the question of how payment is to be determined is a complex one which signals the starting point to a development of a licensing scheme for digital sampling. As one author states:

> *If the use is sufficiently profitable and the copying has been quite substantial, then the copyright owner should in equity be compensated for such use. Admittedly this recommendation will sometimes be difficult to apply: How are reasonable royalties to be determined? When are they to be paid? It is hoped that the procedure for implementing this proposal will not involve legislation or judicial intervention, but will be based on industry-wide negotiations to establish formulas that will not be onerous to the user and will be fair to the copyright owner.[135]*

This author shares the view of many pro-artist, fair use defense advocates, that a licensing scheme is preferable to litigation and can only be effective if it cooperatively takes into account the basic needs of both parties; the sampled artist's need for compensation for and recognition of his or her original creativity[136] as well as the sampler's need for artistic expression at a fair cost. These conflicting interests can be accommodated in the negotiation process. Also, these needs should ideally reflect the Founders' goals for copyright law, as set forth in the Constitution, to "promote . . . Science and useful Arts,"[137] while, at the same time, allowing reasonable financial and actual recognition for the original artistic creation of the sampled artist.

Many sampling artists, with the advice of their attorneys, pay flat fees or a percentage of their royalties to the original artists or their labels and publishers. For instance, the New York based Rap group Stetsasonic constructed a song in spirited defense of sampling and Rap music. The song was woven around music taken from funk artist Lonnie Liston Smith's 1975 piece "Expansions." Before recording their song, Stetsasonic negotiated with Smith and struck an agreement to pay the sampled artist $3,000 for the full ownership of the copyright to "Expansions." Stetsasonic recognized the possibility of some legal wrangling in the future, and therefore obtained permission from Smith to avoid future legal expenses.[138] De La Soul, the defendant in one lawsuit already,[139] decided to avoid legal problems with the 70s funk magnate George Clinton by paying him a flat rate of one cent per album. On the publishing side, Clinton is receiving half the royalties.[140]

Ken Anderson, as noted earlier, in his duties as attorney for the Beastie Boys, spent many hours calling artists in order to "clear" the myriad samples that appeared onthe 1989 album "Paul's Boutique." Mr. Anderson related that most of those samples were cleared for free, including one that was the property of the estate of the Reggae star Bob Marley. Mr. Anderson believes that most sampled artists merely want admission of sampling and recognition.[141]

While the above examples are illustrative of the recognition of a few artists and their representatives that communication should be established and licenses or clearances obtained, there does not appear to be any sort of industry-wide standard of cooperation. Such cooperation would only exist if every sampler was willing to obtain clearance for all of his recognizable and willful samples, no matter how small. Perhaps one of the reasons why all members of the industry are not cooperating is the ambiguity in the Copyright Act which causes fear regarding litigation. Attorney Robert Weiner, a copyright lawyer who represents many samplers and sampled artists, said:

> *Working out a legal defense for clients concerned about crossing the line of copyright is tricky business...Do I advise them to go to the music publisher*

134. See, e.g., **2 J.S. Lawrence and B.Timberg,** supra note 126, at 319.

135. Id. at 324.

136. For example, the pop rapper Vanilla Ice has recently settled with Rob Parissi, the singer-songwriter behind Wild Cherry. Ice sampled the song "Play That Funky Music White Boy." Parissi is willing to settle, and expressed the non financial desire to receive credit for the sample. San Francisco Chronicle, January 30, 1991, Datebook, at 1, col. 3.

137. **U.S. Const. art. 1, § 8, cl. 8.**

138. See Soocher, supra note 21, at 26.

139. See supra Part IV.

140. Newman, NMS Panel: Legally, There Are No Free Samples, **Billboard,** Aug. 12, 1989, at 24, col. 4.

141. Telephone Interview with Ken Anderson, supra note 64.

or the record company? Most lawyers will tell their clients not to ask for legal permission because [before 1994] *if they get turned down and sued then it is intentional infringement.*[142]

Similar fear is widespread throughout the industry. However, it can be alleviated by the introduction of a scheme that all in the industry would be willing to follow. Such a scheme cannot be compulsory, as that would require absolute cooperation of all in the industry,[143] and may need to be statutory in order to be implemented.[144] Rather, the best method in this embryonic and unpredictable era of sampling would be a voluntary scheme, which, if effective over an extended period of time, could then be reported to Congress and the Copyright Office with the goal of possibly amending the Copyright Act to apply to digital sampling.

In the context of the development of such a voluntary scheme it should be cautioned that U.S. antitrust laws preclude price fixing arrangements.[145] However, price fixing can be avoided by the inclusion of a non-compulsory open schedule of payments, based on the agreement of the parties. The only way in which the industry would face an antitrust violation would be if record companies had a broad "sampling treaty" that provided for a rigid royalty rate schedule.[146]

B. Scheme

The scheme itself involves a process to be undertaken by an artist and his management when the artist wishes to engage in sampling. Following the scheme could result in the avoidance of costly litigation or other complications.

Samplers should be required to prepare a list of all of the reasonably recognizable samples that they use on their recordings.[147] Samplers or their representatives should attempt to obtain clearances without payment for all samples listed as there will be no need to pay for the samples in situations where the sampled artist agrees to the proposed use at no cost. Samplers should then obtain a mechanical licensing agreement for [the musical compositions appearing in] those samples cleared.[148] Samplers and sampled artists should then negotiate payment schedules, specific to each particular situation, and dependent on such factors as the amount of work taken and the realistic expectations of sampled artists regarding compensation.[149] Copyright owners should give all requests reasonable consideration and provide licenses at a fair and reasonable rate.[150] Good faith and fair dealing as well as respect for the artistic integrity of both the sampled artist and the sampler should characterize all dealings between the parties. Finally, intra-party determinations should exist to delegate who should bear the cost of the license–the artist or the record company.[151]

This scheme should adequately consider the two sets of rights being determined in the sampling context: those of the master recording copyright owner and those of the owner of the newly recorded song.

The cost of clearances and licenses will depend on a number of factors, such as whether the song is used as a single or an album track, how important a part the use plays in the new composition, how many times the sample is repeated in the sampler's work, and whether the use is offensive to the holder of the copyright.

Any scheme must also take into account both the American Society of Composers Authors, and Publishers (ASCAP), and Broadcast Music Incorporated, (BMI). These organizations' primary objective is the protection of the rights of artists, and, as expected, they have both developed digital sampling policies. BMI waits until works are reported to them and then instructs parties how to split royalties.[152] ASCAP takes a different approach. The group regularly tapes radio broadcast performances, which it analyzes in order to credit sampled artists.[153] This method has shortcomings in the rap world because much of rap is not played on the radio, regardless of substantial sales, because of graphic depictions of street life and strong political undertones.

Ideally, under the above outlined scheme, samplers will report all samples to the sampled artists so there will be no need for the sort of policing which ASCAP is currently undertaking. If so, the industry–wide cooperation regarding the above scheme will not be without benifits. Following the scheme can result in fair payments and recognition to older sampled artists, as well as avoid possible suits where a "washed up" artist is able to take a huge amount of money from a currently profitable rap band. In other words, the scheme allows the sampled artist to receive a fair payment, while preventing this artist from walking away with a windfall for a sample from a record from which he may have granted permission if asked earlier.

In order to illustrate the probable result of noncooperation, the recent story of the group Milli Vanilli can be examined. The group used an old Blood Sweat and Tears song on their polished 1989 hit "All or Nothing" and refused to give the sampled band credit. While it was recently uncovered that the group did not perform on the entire album, they nevertheless are being sued by the sampled artist as "party to the fraud" that denied credit for the sample.[154] As such it appears essential that samplers absolutely admit their samples to avoid being sued for fraudulent misrepresentation and copyright violation. Admission and fair negotiations between the parties could lead to the solution of the sampling problem, while avoiding costly litigation.

Conclusion

Digital sampling is a controversial practice that is incompatible with the Copyright Act. However, the solution to the problem does not lie in litigation. Those that have sued have realized the pitfalls of litigation, which include great cost, unclear applicability of law, and possible defenses such as fair use and contribution of authorship that samplers may utilize effectively. A scheme of licensing based on good faith and fair dealing would solve the problems of both adversaries in the sampling dispute. Sampled artists would get fair financial rewards and recognition, while samplers would have free artistic reign without facing the possibility of a large judgment against them. Industry–wide adherence to a licensing scheme would enable rappers to express their artistic creativity while reflecting musically upon their rich culture.

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142. Lawyers Debate The Legal Realities Of An Emerging New Art Form, Back Stage, Oct. 27, 1989, at 34.

143. 17 U.S.C. § 115 deals with compulsory licenses. Such schemata may prove useful to the sampling context in the future, but an attempt at voluntary licensing seems adequate now. A compulsory system would require the absolute recordation of every sample as well as the intervention of ASCAP and BMI.

144. For example, Ken Anderson cautions against their use in the sampling context because the process is in its implementing stages and therefore rigid compulsory schemata may not be flexible enough for an area that is now far from concrete. Telephone Interview with Ken Anderson, supra note 64.

145. See Theatre Enter. v. Paramount Film Distributing Corp., 346 U.S. 537 (1954); Interstate Circuit Inc. v. United States., 306 U.S. 208 (1939).

146. See S. Gordon and C. Sanders supra note 100, at 5, col. 1.

147. Tommy Boy Records routinely asks the artist or producer of a record to list every sample on the record, no matter how obscure or difficult to hear. Then the new record is compared to the source recording in order to determine what needs clearance. Zimmerman, supra note 99, at 87.

148. This process may necessarily be part and parcel of the clearance process anyway.

149. For instance, if a record is very old, and was never successful, and it is apparent that the artist is simply attempting to capitalize on a potentially legally favorable situation, this should be taken into account in determining payment.

150. Other authors have proposed such a contingency. See S. Gordon & C. Sanders, supra note 100, at 6, col. 3. These authors also point out that all licensing requests should be made in writing. Id. at 6, col. 3.

151. "The record companies argue that these payments are in the nature of recording costs and therefore should be paid from the artist's share of the income. The artists argue that this allows companies to take the risk of not obtaining clearances . . . then in the event that a claim is made, the company simply settles the matter, using the artists royalties when they accrue." Simpson, supra note 22, at 772.

152. For example, De La Soul, after clearing samples with the original writer, tells BMI how to split the royalties. BMI generally has the song's copyright, so if only instrumentals are sampled they may not be needed. See Zimmerman, supra note 99, at 87, col. 2.

153. Id.

154. R. Guilliatt, Illusions and Lawsuits Rock the Video Age, The Independent, Dec. 9, 1990, at 14.

E. *Plunderphonics (or, Audio Piracy as a Compositional Prerogative)* by John Oswald (1985)

A digital sampler is, in its most common form, a tape recorder which looks and acts like an electronic organ. Samplers have become prominent in modern music making and are receiving the sort of publicity in the popular press that synthesizers did two decades ago. Musicians once again fear their impending obsolescence.

A sampler, in essence a recording, transforming instrument, is simultaneously a documenting device and a creative device, in effect reducing a distinction manifested by copyright.

Free samples

These new-fangled, much-talked-about digital sound sampling devices, are, we are told, music mimics par excellence, able to render the whole orchestral panoply, plus all that grunts, or squeaks. The noun "sample" is, in our comodified culture, often pre-fixed by the adjective "free", and if one is to consider predicating this subject, perhaps some thinking aloud on what is not allowable auditory appropriation is to be heard.

Some of you, current and potential samplerists, are perhaps curious about the extent to which you can legally borrow from the ingredients of other people's sonic manifestations. Is a musical property properly private, and if so, when and how does one trespass upon it? Like myself, you may covet something similar to a particular chord played and recorded singularly well by the strings of the estimable Eastman Rochester Orchestra on a long-deleted Mercury *Living Presence* LP of Charles Ives' *Symphony #3*[1], itself rampant in unauthorized procurements. Or imagine how invigorating a few retrograde Pygmy (no slur on primitivism intended) chants would sound in the quasi-funk section of your emulator concerto. Or perhaps you would simply like to transfer an octave of hiccups from the stock sound library disk of a *Mirage* to the spring-loaded tape catapults of your *Melotron*[2].

Can the sounding materials that inspire composition be sometimes considered compositions themselves? Is the piano the musical creation of Bartolommeo Cristofori (1655-1731) or merely the vehicle engineered by him for Ludwig Van and others to manœuver through their musical territory? Some memorable compositions were created specifically for the digital recorder of that era, the music box. Are the preset sounds in today's sequencers and synthesizers free samples, or the musical property of the manufacturer?[3] Is a timbre any less definably possessable than a melody? A composer who claims divine inspiration is perhaps exempt from responsibility to this inventory of the layers of authorship. But what about the unblessed rest of us?

Let's see what the powers that be have to say. 'Author' is copyrightspeak for any

This paper was initially presented at the Wired Society Electro-Acoustic Conference in Toronto in 1985. It was aressed primarily to electronic music makers, but is equally applicable to those with a listening perspective. It was also published in **Musicworks #34**, *as a booklet by* **Recommended Quarterly**, *and subsequently revised for the* **Whole Earth Review #57** *as* 'Bettered by the borrower'.

1. Mercury SR90149. The question of user (as opposed to listener) accessibility to this recording is a bit complicated, and the answer varies from country to country. Recordings fixed before 1972 are not protected by federal copyright in the U.S., but in some cases are protected under common law and state antipiracy statutes. *Symphony #3* was published and copyrighted in 1947 by Arrow Music Press, Inc. That the copyright was assigned to the publisher instead of the composer was the result of Ives' disdain for copyright in relation to his own work, and his desire to have his music distributed as widely as possible. He at first self published and distributed volumes of his music free of charge. In the postscript of *114 Songs* he refers to the possessor as the *gentle borrower.* Sometime following these offerings Ives granted permission for the publication of his music in the periodical *New Music* with the condition that he pay all the costs:
"It seems he had been incensed to find out that, according to its custom, New Music *had taken out a copyright in the composer's name for the part of his* Fourth Symphony *that it had issued. Ives stalked up and down the room, growing red in the face to an alarming degree and flailing the air with his cane: 'EVERYBODY who wants a copy is to have one! If anybody wants to copy or reprint these pieces, that's FINE! This music is not to make money but to be known and heard. Why should I interfere with its life by hanging onto some sort of personal legal right in it?'"* (from *Charles Ives and his Music,* by Henry & Sidney Cowell, Oxford University Press, 1955, p. 121-2)
Later in his life Ives did allow for commercial publication, but always assigned royalties to other composers. About the *Third Symphony* itself, the original of which was lost: *"Ives' corrections– that Ives himself added, or left out, or chanted, or tampered with, when he had to rewrite the score virtually from memory, at Elk Lake in 1911."* (from *From the Steeples and Mountains* by David Wooldridge, Alfred A. Knopf Inc., 1974)
Ives admired the philosophy of Ralph Waldo Emerson who, in his essay *Quotation and Originality* has said, *"A man will not draw on his invention when his memory serves with a word as good"*; and, *"What you owe to me– you will vary the phrase– but I shall still recognize my thought. But what you say from the same idea, will have to me also the expected unexpectedness which belongs to every new work of Nature."*

2. 'Emulator' and 'Mirage' accurately describe the machines for which they are names. 'Window Recorder' is a more ambitious cognomen for a device that can store longer programs than can most samplers (which usually hold 4-20 seconds of sampled sound) and therefore bridges the sense of the terms sampler and digital recorder. At the other end digital delays are in effect short term samplers.

3. The following quotes are excerpts from a forum which took place during January '86 on PAN, a musicians' computer network billboard:
Hensley: *the opinion of the legal professionals was because the hardware served to limit the number of possible sounds and because it was not only possible but probable that two individuals could independently program identical sounds...because of all that, patches for synthesizers did not fall into the realm of material for which a copyright could be effectively protected.*
R. Hodge: *If everyone 'has' and is using a sound then what good is it? (Well that wouldn't make it bad, but it would lose its impact).*
SPBSP: *What good is a great sound if it's available to the 'masses?'? Well...what good is a hammond B-3, a stratocastor, a fender rhodes, or a stradivarius???? great players/programmers give sounds freely, confident perhaps, that it's not the size it's the motion.*
Dave at Keyboard: *I don't think a sound should be thought of in the same terms as a book, or a musical composition. Really fine work in any field would be greatly diminished by changing a word, removing a note or resculpturing an appendage. A sound is more subjective, more like a recipe.*
Bill Monk: *My outlook has been that while a patch is copyrightable (melodies are, though they are produced with far fewer parameters) it doesn't really matter. Those interested in 'stealing' patches are probably unlikely to be able to make their own or to alter the stolen one in any significant way. But I can make plenty more with a little time and effort. It's the continuing ability that counts, not just having a few great patches.*
M. Fischer: *At this point it is not entirely clear that 'sounds' are copyrightable; but a strong case can be made for their protection under copyright. The closest reported legal decision was one involving the Chexx hockey game (booing and cheering noises). That case held the sounds to be protectible sound recordings.*
Southworth: *...various DX7 programmers have told me that they 'bury' useless data in their sounds so that they can prove ownership later. Sometimes the data is obvious, like weird keyboard scalings on inaudible operators, and sometimes it's not, like the nonsense characters (I seem to recall I once thought they were Kanji) in a program name. Of course, any pirate worth his salt would find all these things and change them...Synth programmers are skilled crafts people, just like violin makers so if they go to the trouble of making new and wonderful sounds that other people can use, they should be compensated for their efforts. Unfortunately it's not as easy as just selling the damn violin.*
I found additional mention on PAN of Synth Bank, a large public domain offering plus 'for sale' sounds; and this quote from Sweetwater, a swapping network for the Kurzweil (heavily promoted as a great piano mimic) sampler: *"also we cross-sampled most of the Emulator II's library...(nothing is sacred)..."* And then there's this quote from Digidesign's promo literature for the Sound Designer (software support for the Emulator): *"Sound Designer's 'pencil' lets you draw waveforms from scratch, or repair sampled sounds. Have a click in a sound sampled from a record? Just 'draw' out the waveform."* Whose record? Samples are recordings and theoretically are copy-protected as such. But as PAN correspondent Bill Monk says, being able to prove ownership and actually going to court over a voice are two different things.

creative progenitor, no matter if they program software or compose hardcore. To wit: [in Canada] "An author is entitled to claim authorship and to preserve the integrity of the work by restraining any distortion, mutilation or other modification that is prejudicial to the author's honor or reputation." That's called the 'right of integrity' and it's from the Canada Copyright Act[4]. A recently published report on the proposed revision of the Act uses the metaphor of land owners' rights, where unauthorized use is synonymous with trespassing. The territory is limited. Only recently have sound recordings been considered a part of this real estate.

"Blank tape is derivative, nothing of itself"

Way back in 1976, ninety-nine years after Edison went into the record business, the U.S. Copyright Act was revised to protect sound recordings in that country for the first time. Before this, only written music was considered eligible for protection. Forms of music that were not intelligible to the human eye were deemed ineligible. The traditional attitude was that recordings were not artistic creations, "but mere uses or applications of creative works in the form of physical objects."[5]

Some music oriented organizations still retain this 'view'. The current Canadian Act came into being in 1924, an electric eon later than the original U.S. Act of 1909, and up here "copyright does subsist in records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced."

Of course the capabilities of mechanical contrivances are now more diverse than anyone back at the turn of the century forecasted, but now the real headache for the writers of copyright is the new electronic contrivances, including digital samplers of sound and their accountant cousins, computers. Among "the intimate cultural secretions of electronic, biological, and written communicative media"[6] the electronic brain business is cultivating, by grace of its relative youth, pioneering creativity and a corresponding conniving ingenuity. The popular intrigue of computer theft has inspired cinematic and paperback thrillers while the robbery of music is restricted to elementary poaching and blundering innocence. The plots are trivial: Disney accuses Sony of conspiring with consumers to make unauthorized mice[7]. Former Beatle George Harrison is found guilty of an indiscretion in choosing a vaguely familiar sequence of pitches[8].

The dubbing-in-the-privacy-of-your-own-home controversy is actually the tip of a hot iceberg of rudimentary creativity.

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4. *A Charter of Rights for Creators.* Report of the Sub-Committee on Revision of Copyright. This is the latest of sixteen studies published by the government in anticipation of a revised Canada Copyright Act. It follows *From Gutenberg to Telidon*, the final statement from the preceding party in power. The following quotes are from *A Charter of Rights for Creators:*
"There is more at stake in the exploitation of a work than economic reward. Creative works are very much an expression of the personality of their authors. There is an identification between authors and their works. The Sub-Committee agrees with the many witnesses who stated that creators cannot be fully protected unless their moral rights are recognized and enhanced.
Another consequence of the language used in the present Act is that moral rights appear to be protected only during the life of the author rather than the usual term of life of the author plus 50 years. If moral rights are to be recognized as being as important as economic rights, the term of protection should be the same." p. 6
"Witnesses before the Sub-Committee also supported the recommendation in From Gutenberg to Telidon *that unauthorized modification of the original of an artistic work should be an infringement of the moral right of integrity, even in the absence of evidence of prejudice to the artist's honour or reputation. The Sub-Committee agrees that this recommendation should be adopted, together with its limitations relating to physical relocation, alteration of the structure containing the work, and legitimate restoration and preservation activities.*
The Sub-Committee wishes to make clear, however, that respect for works of the mind and their creators should not take the form of paternalism. Creation is, after all, one of the most self-assertive pursuits that can be imagined, precisely because it is a process fraught with considerable risk. Artists and other creators will always have to go through a struggle in which many fail and where there cannot be any guarantee of success." p. 7
"The twentieth century has seen the emergence of new media of cultural expression: record, films, broadcasts, computers. As opposed to the more traditional vehicles of creative expression such as writing, drama or art, the new media often require more equipment and a large diversified creative team. Creation is no longer only a craft but also an industry.
This change does not just involve new forms of economic organization but reaches into the creative process itself. For example, in a sound recording the creative aspects include the choice of works, the contribution of musicians and performers, the work of sound mixers and so on. Here the contribution of each team member is also distinct but not seperable from the final product: the outcome is greater than the sum of its parts." p. 13
"Of the numerous works covered by the Copyright Act, only one– a musical work– is specifically defined. All the others are described by way of examples, a method of legal drafting which gives scope for flexibility if circumstances change. Because musical works are presently defined as combinations of melody and harmony, or either of them, which have been 'printed, reduced to writing, or otherwise graphically produced or reproduced,' much contemporary music may not be protected by copyright because it is never written down.
It is time for the law to apply the criterion of fixation as flexibly to musical works as it does to other works. It is irrelevant that a musical work is fixed by recording as opposed to written notation. A law revised in this manner would be consistent in treating, insofar as possible, all subject matter in the same manner." p. 30-1
"The present law assimilates sound recordings to musical, literary or dramatic works. This categorization is outdated. It is time to protect sound recordings as a separate category of subject matter. In addition, the law should specify that that the protection of a sound recording is totally independent of what is recorded. It is irrelevant whether what is recorded is a work which is protected by copyright or is in the public domain. For example, bird sounds do not constitute subject matter protected by copyright because such sounds are not works. But a sound recording of the same bird sounds would be protected as falling within the new category of copyright subject matter suggested in this recommendation." p. 49

After decades of being the passive recipients of music in packages, listeners now have the means to assemble their own choices, to separate pleasures from the filler. They are dubbing a variety of sounds from around the world, or at least from the breadth of their record collections, making compilations of a diversity unavailable from the music industry, with its circumscribed stables of artists, and an ever more pervasive policy of only supplying the common denominator.

The Chiffons/Harrison case, and the general accountability of melodic originality, indicates a continuing concern for what amounts to the equivalent of a squabble over the patents to the Edison cylinder.

The commerce of noise

The precarious commodity in music today is no longer the tune. A fan can recognize a hit from a ten millisecond burst[9], faster than a Fairlight can whistle Dixie. Notes with their rhythm and pitch values are trivial components in the corporate harmonization of cacophony. Few pop musicians can read music with any facility. The Art of Noise, a studio based, mass market

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5. References to the U.S. Copyright Act are taken from *This Business of Music* by Shemel and Krasilovsky (Billboard Publications, 1979) and *A treatise on the wages of sinning for sound* by Tom Schulteiss, which classifies appropriation activities as follows–

bootlegging:	unauthorized recordings
piracy:	unauthorized manufacture
counterfieting:	illegal duplication
plagiarism:	pose as originator of parts, ideas or language
copyright infringement:	unauthorized adaptation.

6. This is Chris Cutler's poignant phrase, from *File Under Popular* (November Books, 1985), which also includes a good analysis of attempted definitions of folk music integral to the use of that term in Plunderphonics:
First, the medium of its musical generation & perpetuation is tradition & is based in Human, which is to say biological, Memory. This mode centres around the EAR & can exist only in two forms: as sound & as memory of sound.
Second, the practice of music is in all cases an expressive attribute of a whole community, which adapts & changes as the concerns & realities it expresses– or as the vocabulary of the collective aesthetic– adapt & change. There is no other external pressure upon it.
Third, there can be no such thing as a finished or definitive piece of music. At most there could be said to be 'matrices' or 'fields'. Consequently there is also no element of personal property, though there is of course individual contribution." p. 133-4
7. Ninth U.S. Circuit Court of Appeals *Betamax* decision on a suit by Walt Disney and Universal Studios against Sony. The courts decided that home taping off air television was breaking the law. Curiously, the record industry had never filed a similar suit against audio recorder manufacturers. *"Parasitic and predatory,"* quoth Stanley Gortikov, president of RIAA (Recording Industry Association of America) regarding the blank tape industry. *"Home taping has exploded. The shrapnel of that explosion drains the lifeblood of the musical community...It renders weak the recording companies whose works have become a worldwide means of communication."*
Our subhead *"Blank tape is derivative, nothing of itself"*, is by David Horowitz of Warner Communications (from *The War Against Home Taping* in *Rolling Stone*, Sept. 16, '82, p. 62)

targeted recording firm, strings atonal arrays of timbres on the line of an ubiquitous beat. The Emulator fills the bill. Singers with original material aren't studying Bruce Springsteen's melodic contours, they're trying to *sound* just like him. And sonic impersonation is quite legal. While performing rights organizations continue to farm for proceeds for tunesters and poetricians, those who are shaping the way the buck says the music should be, rhythmatists, timbralists and mixologists under various monikers, have rarely been given compositional credit[10].

At what some would like to consider the opposite end of the field, among academics and the salaried technicians of the orchestral swarms, an orderly display of fermatas and hemidemisemiquavers on a page is still often thought indispensible to a definition of music, even though some earnest composers rarely if ever peck these things out anymore. Of course, if appearances are necessary, a computer program and printer can do it for them.

Musical language has an extensive repertoire of punctuation devices but nothing equivalent to literature's " " quotation marks. Jazz musicians do not wiggle two fingers of each hand in the air, as lecturers often do, when cross referencing during their extemporizations, because on most instruments this would present some technical difficulties– plummeting trumpets and such.

Without a quotation system, well-intended correspondences cannot be distinguished from plagiarism and fraud. But anyway, the quoting of notes is but a small and insignificant portion of common appropriation.

Am I underestimating the value of melody writing? Well, I expect that before long we'll have marketable expert tune writing software which will be able to generate the banalities of catchy permutations of the diatonic scale in endless arrays of tuneable tunes, from which a not necessarily affluent songwriter can choose; with perhaps a built-in checking lexicon of used-up tunes which would advise Beatle George[11] not to make the same blunder again.

Chimeras of sound

Some composers have long considered the tape recorder a musical instrument capable of more than the faithful hi-fi transcriber role to which manufacturers have traditionally limted its function. Now there are hybrids of the electronic offspring of acoustic instruments and audio mimicry by the digital clones of tape recorders. Audio mimicry by digital means is nothing new; mechanical manticores from the 19th century with names like the *Violano-virtuoso* and the *Orchestrion* are quaintly similar to the *Synclavier Digital Music System* and the *Fairlight CMI* (computer music instrument). In the case of the Synclavier, what is touted as a combination multi-track recording studio and simulated symphony orchestra looks like a piano with a built-in accordion chordboard and LED clock radio.

The composer who plucks a blade of grass and with cupped hands to pursed lips creates a vibrating soniferous membrane and resonator, although susceptible to comments on the order of "it's been done before", is in the potential position of bypassing previous technological achievement and communing directly with nature. Of music from tools, even the iconoclastic implements of a Harry Partch or a Hugh LeCaine are susceptible to the convention of distinction between instrument and composition. Sounding utensils, from the *erh-hu* to the *Emulator*, have traditionally provided such a potential for varied expression that they have not in themselves been considered musical manifestations. This is contrary to the great popularity of generic instrumental music (*The Many Moods of 101 Strings*, *Piano for Lovers*, *The Truckers DX-7*, etc.), not to mention instruments which play themselves, the most pervasive example in recent years being pre-programmed rhythm boxes. Such devices, as are found in lounge acts and organ consoles, are direct kin to the juke box: push a button and out comes music. J.S.Bach pointed out that with any instrument "all one has to do is hit the right notes at the right time and the thing plays itself." The distinction between sound producers and sound reproducers is easily blurred, and has been a conceivable area of musical pursuit at least since John Cage's use of radios in the Forties.

Starting from scratch

Just as sound producing and sound reproducing technology becomes more interactive, listeners are once again, if not invited, nonetheless encroaching upon creative territory. This prerogative has been largely forgotten in recent decades. The now primitive record-playing generation was a passive lot (indigenous active form *scratch* belongs to the post-disc, blaster/walkman era). Gone were the days of lively renditions on the parlor piano.

Computers can take the expertise out of amateur music making. A current *music-minus-one* program retards tempos and searches for the most ubiquitous chords to support the wanderings of a novice

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8. George Harrison was found guilty of subconsciously plagiarizing the 1962 tune *He's So Fine* by the Chiffons in his song *My Sweet Lord* (1970).
In his speculative story *Melancholy Elephants* (Penguin Books, 1984) Spider Robinson writes about the pros and cons of rigorous copyright. The setting is half a century from now. Population has increased dramatically, with a lot of people living to over 120. There are lots of composers. This story centres on one person's opposition to a bill which would extend copyright to perpetuity. In Robinson's future composition is already difficult, as most works are being deemed derivative by the copyright office. The Harrison case is cited as an important precedent. *"Then in the late 80's the great Plagiarism Plague really got started in the courts. From then on it was open season on popular composers, and still is. But it really hit the fan at the turn of the century, while Brindle's* Ringsong *was shown to be 'substantially similar' to one of Corelli's concertos."*
Robinson points out that the currently prevalent system of composition has a limited number of specifiable notes which can be combined in a large but finite number of ways.
"She paused to gather her thoughts, sipped her juice. A part of her mind noted that it harmonized with the recurrent cinnamon motif of Bulachevski's scent-symphony, which was still in progress.
"Artists have been deluding themselves for centuries with the notion that they create. In fact they do nothing of the sort. They discover. Inherent in the nature of reality are a number of combinations of musical tones that will be perceived as pleasing by a human central nervous system. For millennia we have been discovering them, implicit in the universe– and telling ourselves that we 'created' them. To create implies infinite possibility. As a species I think we will react poorly to having our noses rubbed in the fact that we are discoverers and not creators." p. 16

9. The ten millisecond figure is not based on any psychophysical research I've seen but rather is a duration near the faster threshold of musical sense, which is approached by the examples given in hit parade recognition contests.

10. From *A Charter of Rights for Creators:*
"The twentieth century has seen the emergence of new media of cultural expression: record, films, broadcasts, computers. As opposed to the more traditional vehicles of creative expression such as writing, drama or art, the new media often require more equipment and a large diversified creative team. Creation is no longer only a craft but also an industry.
This change does not just involve new forms of economic organization but reaches into the creative process itself. For example, in a sound recording the creative aspects include the choice of works, the contribution of musicians and performers, the work of sound mixers and so on. Here the contribution of each team member is also distinct but not seperable from the final product: the outcome is greater than the sum of its parts." p. 13

11. The Beatles, and especially Harrison, are an interesting case of reciprocity between fair use and the amassing of possession and wealth. *"We were the biggest nickers in town. Plagiarists extraordinaire."* says Paul McCartney (*Musician*, Feb. '85 p.62). He owns one of the world's most extensive song catalogs, including a couple of state anthems. John Lennon incorporated collage techniques into pieces like *Revolution #9* which contains dozens of looped unauthorized fragments taped from radio and television broadcasts.
George obviously wasn't *subconsciously plagiarizing* in the case of his LP, *Electronic Sound*. This release consisted of nothing more than a tape of a demonstration electronic musician Bernie Krause had given Harrison on the then new Moog synthesizer.
Krause: *"I asked him if he thought it was fair that I wasn't asked to share in the disc credits and royalties. His answer was to trust him, that I shouldn't come on like Marlon Brando, that my name alone on the album would do 'your career good,' and that if the album sold, he would give me 'a couple of quid.'"* The record was released with George's name in big letters, while Krause's was obscured.

player. Some audio equipment geared for the consumer inadvertently offers interactive possibilities. But manufacturers have discouraged compatability between their amateur and pro equipment. Passivity is still the dominant demographic. Thus the atrophied microphone inputs which have now all but disappeared from premium stereo cassette decks[12].

As a listener my own preference is the option to experiment. My listening system has a mixer instead of a receiver, an infinitely variable speed turntable, filters, reverse capability, and a pair of ears.

An active listener might speed up a piece of music in order to perceive more clearly its macrostructure, or slow it down to hear articulation and detail more precisely. Portions of pieces are juxtaposed for comparison or played simultaneously, tracing "the motifs of the Indian raga Darbar over Senegalese drumming recording in Paris and a background mosaic of frozen moments from an exotic Hollywood orchestration of the 1950's (a sonic texture like a *Mona Lisa* which in close-up, reveals itself to be made up of tiny reproductions of the Taj Mahal)."[13]

During World War II, concurrent with Cage's re-establishing the percussive status of the piano, Trinidadians were discovering that discarded oil barrels could be cheap, available alternatives to their traditional percussion instruments which were, because of the socially invigorating potential, banned. The steel drum eventually became a national asset. Meanwhile, back in the States, for perhaps similar reasons, *scratch* and *dub* have, in the Eighties, percolated through the black American ghettos. Within an environmentally imposed, limited repertoire of possessions a portable disco may have a folk music potential exceeding that of the guitar. Pawned and ripped-off electronics are usually not accompanied by user's guides with consumer warnings such as "this blaster is a passive reproducer". Any performance potential found in an appliance is often exploited. A record can be played like an electronic washboard. Radio and disco jockeys layer the sounds of several recordings simultaneously[14]. The sound of music conveyed with a new authority over the airwaves is dubbed, embellished and manipulated in kind.

The medium is magnetic

Piracy or plagiarism of a work occur, according to Milton, "if it is not bettered by the borrower". Stravinsky added the right of possession to Milton's distinction when he said, "A good composer does not imitate; he steals." An example of this better borrowing is Jim Tenney's *Collage 1* (1961) in which Elvis Presley's hit record *Blue Suede Shoes* (itself borrowed from Carl Perkins) is transformed by means of multi-speed tape recorders and razorblade. In the same way that Pierre Schaeffer found musical potential in his *object sonore*, which could be, for instance, a footstep, heavy with associations, Tenney took an everyday music and allowed us to hear it differently. At the same time, all that was inherently Elvis radically influenced our perception of Jim's piece.

Fair use and *fair dealing* are respectively the American and the Canadian terms for instances in which appropriation without permission might be considered legal. Quoting extracts of music for pedagogical, illustrative and critical purposes have been upheld as legal fair use. So has borrowing for the purpose of parody. Fair dealing assumes use which does not interfere with the economic viability of the initial work.

In addition to economic rights, moral rights exist in copyright *[except in the U.S.]*, and in Canada these are receiving a greater emphasis in the current recommendations for revision. An artist can claim certain moral rights to a work. Elvis' estate can claim the same rights, including the right to privacy, and the right to protection of "the special significance of sounds peculiar to a particular artist, the uniqueness of which might be harmed by inferior unauthorized recordings which might tend to confuse the public about an artist's abilities.

At present, in Canada, a work can serve as a matrix for independent derivations. Section 17(2)(b) of the Copyright Act of Canada provides "that an artist who does not retain the copyright in a work may use certain materials used to produce that work to produce a subsequent work, without infringing copyright in the earlier work, if the subsequent work taken as a whole does not repeat the main design of the previous work."

My observation is that Tenney's *Blue Suede* fulfills Milton's stipulation; is supported by Stravinsky's aphorism; and does not contravene Elvis' morality or Section 17(2)(b) of the Copyright Act.

Aural wilderness

The reuse of existing recorded materials is not restricted to the street and the esoteric. The single guitar chord occuring infrequently on H. Hancock's hit arrangement *Rocket* was not struck by an in-studio union guitarist but was sampled directly from an old Led Zeppelin record. Similarly, Michael Jackson unwittingly turns up on Hancock's follow-up clone *Hard Rock*. Now that keyboardists are getting instruments with the button for this appropriation built in, they're going to push it, easier than reconstructing the ideal sound from oscillation one. These players are used to fingertip replication, as in the case of the organ that had the titles of the songs from which the timbres were derived printed on the stops[15].

So the equipment is available, and everybody's doing it, blatantly or otherwise. Melodic invention is nothing to lose sleep over (look what sleep did for Tartini). There's a certain amount of legal leeway for imitation. Now can we, like Charles Ives, borrow merrily and blatantly from all the music in the air?

Ives composed in an era in which much of music existed in a public domain. Public domain is now legally defined, although it maintains a distance from the present which varies from country to country. In order to follow Ives' model we would be restricted to using the same oldies which in his time were current. Nonetheless, music in the public domain can become very popular, perhaps in part because the composer is no longer entitled to exclusivity, or royalty payments— a hit available *for a song*. Or as *This Business of Music* puts it, "The public domain is like a vast national park without a guard to stop wan-

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12. The pause button on home cassette recorders is used for editing and collaging on the fly, i.e. selective editing in real time. This has led to a connoisseurism of the personality of the pause on various decks. Each makes a different sounding edit. Some can be operated more quickly and precisely than others. Several composers prefer the long discontinued TC153-158 lineage to all others. The Sony saga of consumer targeted digital recorders is an interesting case of maintaining the pro/amateur gap. The relatively inexpensive PCM-F1 portable digital/analog convertor was probably bought by more professionals than home recordists. It was essentially compatible with and could substitute for much more expensive professional equipment. Sony discontinued the F1, replacing it with the 701E which was not portable and did not have mike inputs. But it could still be adapted as a professional studio converter. So Sony emasculated it, introducing the 501E, similar, but for most audio purposes incompatible.

13. Quoted from John Hassel's essay *Magic Realism*, this passage refers in an evocative way to some appropriations and transformations in Hassel's recordings. In some cases this type of use obscures the identity of the original and at other times the sources are recognizable.

14. *"He invented the technique of 'slip-cueing': holding the disc with his thumb whilst the turntable whirled beneath, insulated by a felt pad. He'd locate with an earphone the best spot to make the splice then release the next side precisely on the beat...His tour de force was playing two records simultaneously for as long as two minutes at a stretch. He would super the drum break of* I'm A Man *over the orgasmic moans of Led Zeppelin's* Whole Lotta Love *to make a powerfully erotic mix...that anticipated the formula of bass drum beats and love cries...now one of the cliches of the disco mix."* Referring to DJ Francis Grosso at the Salvation club in New York in the mid-seventies from *Disco* by Albert Goldman. Also referred to in *Behind the Groove* by Steven Harvey (*Collusion* #5).

15. I have been unable to relocate the reference to this device which had for example a '96 Tears' stop. According to one source it may have been only a one-off mockup in ads for the Roland Juno 60 synthesizer.

ton looting, without a guide for the lost traveller, and in fact, without clearly defined roads or even borders to stop the helpless visitor from being sued for trespass by private abutting owners."

Professional developers of the musical landscape know and lobby for the loopholes in copyright. On the other hand, many artistic endeavours would benefit creatively from a state of music without fences, but where, as in scholarship, acknowledgement is insisted upon.

"The buzzing of a titanic bumblebee"[16]

The property metaphor used to illustrate an artist's rights is difficult to pursue through publication and mass dissemination. The *hit parade* promenades the aural floats of pop on public display, and as curious tourists should we not be able to take our own snapshots through the crowd ("tiny reproductions of the Taj Mahal") rather than be restricted to the official souvenir postcards and programmes?

All popular music (and all folk music, by definition), essentially, if not legally, exists in a public domain. Listening to pop music isn't a matter of choice. Asked for or not, we're bombarded by it. In its most insidious state, filtered to an incessant bass-line, it seeps through apartment walls and out of the heads of *walk people.* Although people in general are making more noise than ever before, fewer people are making more of the total noise; specifically, in music, those with megawatt PA's, triple platinum sales, and heavy rotation. Difficult to ignore, pointlessly redundant to imitate, how does one not become a passive recipient?

Proposing their game plan to apprehend the Titanic once it had been located at the bottom of the Atlantic, oceanographer Bob Ballard of the Deep Emergence Laboratory suggested "you pound the hell out of it with every imaging system you have."

16. *"A musical note like the buzzing of a titanic bumblebee which sped through space,"* was one account of the sound radio amateurs were receiving along the eastern seaboard in 1914, a year after the *Rite of Spring* riot. No one knew what these sounds were until one experimenter recorded them on a hand cranked Edison cylinder phonograph. When he accidentally played the recording back with the machine undercranked, he heard the slowly turning cylinder rersolve the high pitched whistles into the dots and dashes of Morse code.
Further investigation revealed that an American radio statio was broadcasting these signals to German U-Boats off the coast. A war happened to be on at the time. The U.S. Navy seized the station. A lid of secrecy was clamped on the recordings until recent times. The Freedom of Information Act has allowed the National Archives to make them public. The Freedom of Information Act has made the titanic bumblebee available but Alvin the Chipmunk, essentially a character by means of a specific tape recorder technique– double speed playback of the human voice– continues to retain exclusive rights.

F. Taking Sampling Fifty Times Beyond the Expected (Musicworks Magazine Interview with John Oswald,1990)

NORMAN IGMA: What were the events which led to the eventual crushing of the *plunderphonic* CDs?

JOHN OSWALD: Distribution of the CD commenced around Halloween. There were about a thousand copies pressed. Copies went to libraries, radio stations, the artists who had been electroquoted, and the press. One copy was requested by and received by a so-called reporter for the Canadian Broadcasting Corporation. He was preparing, as-it-turned-out, a sort of docudrama for which he was manipulating information to fit his thesis that *plunderphonic* is an opportunistic sham. In an attempt to create some news for his item he flashed his copy of the CD, which has as a frontpiece a photo collage of Michael Jackson as a naked white woman, in front of Brian Robertson, president of the Canadian Recording Industry Association, scion of the appropriative arts, as far as he's aware of them, and a flaming prude. You hear, as was subsequently broadcast on national radio[1], a great gasp, and then after an edited insert in which the reporter informs us that "John Oswald's so-called macroquotes look more like copyright violations", Mr Robertson says, in part, "... uh it, maybe it's hiding behind artistic expression... perhaps, but all we see it is, is another, is just another example of uh, of theft."

How did this reporter, as you say, manipulate information.

Above and beyond the subtle ways images are selectively laundered in the media; an example of the opposite being how I just quoted Brian Robertson precisely, with all his verbal groping, because it makes him look stupider than if I had simplified it and cut the stutters and hesitations. Since Mr. Robertson has on several occasions slandered me in the press and even broadcast suspicions about the veracity of my participation in our subsequent legally bound agreement, I have no qualms about letting him, for the sake of accuracy, sound authentically muddled.

In the case of this reporter, as appropriately named Little as some people have considered me to be named Oswald: Little, who is a failed pop musician was careful in never mentioning in the context of his docudrama, which coddled others, friends of the reporter I suspect, who profit from covert sampling, that my release of overt sampling was not for sale. His upsidedown thesis was to applaud those plagiarists who sample for their own profit without accrediting sources, and that *plunderphonic* was artistically suspect and not acceptable to the recording industry. He baited Brian Robertson, the guard-dog for the major record labels; the guy whose job it is to sniff out and have prosecuted those who manufacture pirated, counterfeit replicas of the records of Michael Jackson and other performers who sell so many records that its difficult to keep track of who's reaping the profits.

And so you've been lumped in with the pirates.

Well there are traditional associations between the words 'plunder' and 'piracy'. Perhaps I should have called this stuff *flatterfonics* or *quote-a-musics* or something cute and unthreatening. Something I have discovered from talking to employees of this industry, including lawyers, administrators and performers' managers- anyone who prefers to refer to as the 'music business' rather than to the music itself- none of them can get a handle on why someone would create something, except to make money. To them it's like an incomprehensible alien life form.

But since you weren't making money from it why should any of them be concerned?

Because if it manages to come to their attention at all, which this item has, it has gone through enough filters of inattention to be a bit of a rare surprise. Now if you look at the *plunderphonic* CD from the point of view that its an attractive package of a large quantity of music in some part by the most popular perpetrators of music, and it's being given away for free, when you are in the business of selling CDs with much less content for $20, you might consider this unfair competition. Not only am I not getting any of the consumer's entertainment money (and as, I've mentioned, some of my adversaries find this contention suspect) but neither is Michael Jackson nor any of the performers whose rights he owns; the Beatles for example.

There are fewer copies of the *plunderphonic* CD in existence in the world than a single record store would sell of a major hit record in a week, but nonetheless the implications of the existence of these few hundred discs are unpredictable- it might effect the market. Mr Robertson undoubtedly has all sorts of questions concerning the existence of this bit of what he would consider visual and aural pornography, above and beyond publicly denouncing it on first glance.

So what did he do next?

Little gave him my phone number, and he called to politely request a copy. This was in mid-November. I wasn't aware of the tone and contents of the Little show until after its broadcast in January. I was aware of CRIA's affiliation with the major record labels who distribute a large portion of the material quoted on my disc so, since I think these sources have at least as much right as anyone to hear this material, I mailed CRIA a copy. I was in the process of trying to get copies to the quoted parties but I should point out how I was being selective about this. In the case of Michael Jackson I didn't send copies to his management for the same reason I didn't contact them for permission to use this material before the fact of its creation or reproduction. The answer before the fact would be the same as their response after the fact: "no way". At least, after the fact, the evidence of its integrity would be available to everyone to judge. I had sent a copy of the disc to Michael Jackson's fan club, which is the only address you'll find on the *Bad* disc. I took advantage of opportunities to have copies delivered in person to the electroquoted performers, so, for example, when Paul McCartney came through town, someone who was to interview him had a copy to pass on. I generally avoided sending copies to the management of these performers for the same reasons I've made the business aspects of the entire project secondary to creative participation.

But here was a request for a copy from someone in the business, and I was obliging myself to accomodate anyone who was interested in getting a copy. Because of the small number of copies in existence, individuals have been directed to get their copies by dubbing radio broadcasts or library copies. Devoting distribution to public access organizations was my way of making copies available in some way to a large number of people. CRIA was an obvious conduit to the major labels and I was concerned not to withhold any information from anyone who was curious, because the project is set up in such a way that there's nothing to hide. This is still the case.

A week went by and then I got another phone call from Brian Robertson. He asked if I was aware that my CD probably infringed the copyrights of the artists I used. I replied that in my opinion, according to my understanding of the copyright laws, which I had read, albeit with a layman's understanding, I was not infringing anyone's copyright.

I had sent the signal that I was operating without legal consul. He said he'd call me back.

A few days later he called to say that he had listened to the track *Dab* and he was

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1. *CBC Sunday Morning*, January 7th, 1990

fairly sure he could detect actual samples of Michael Jackson himself in my song. I pointed out to him that the piece was made entirely, 100%, from samples of Michael Jackson's song *Bad* and that this fact was clearly indicated in the notes which he had for the disc. He said he'd call me back.

The important aspect of Mr Robertson's aural detective work was that what he thought he heard was pointed out to him before he listened to it. Michael Jackson samples can be found in all sorts of songs on the hit parade and are probably barely hidden in as many others. The qualifier for practical appropriation most often cited by pop people, with the exception of the rappers, is that it's OK to sample as long as the sample doesn't sound too much like the original. Meaning: sampling is OK as long as you don't get caught. By this rule my policy of accrediting sources as if I was writing a research paper is not the way to play the game.

Do you think that if he wouldn't have been able to distinguish Michael Jackson's voice he would have left you alone?

Well first of all we can't be sure that he would have been able to distinguish anything by ear without being told what it is first. You don't have to have any particular listening skills to have his job.

The most influential distinction in the music world today, after racist and sexist categorization, is between the familiar and the unknown. The common critical declensions of artistic experience are *likeable* (as in "I know what I like"), *boring* and *weird*. CRIA always advertises the fact that they represent the purveyors of 95% of the recorded music bought and sold in this country. They don't say that this 95% represents less than 1% of the variety of recorded music available. I imagine that to Brian Robertson *plunderphonic* is part of an indistinguishable weirdness which he only occasionally encounters.

But most people are more visually than aurally literate. So he was able to read the cover photo all right, and as he has stated elsewhere that's what got him going[2].

Next he phoned to ask me for extra copies of the CD. He said he could pay me for these copies. I reiterated that I was not selling the disc under any circumstances and asked who the extra copies were for. He said they were for friends of his in the recording industry. I asked him for their names so that I could send them copies directly. He said their names were confidential. I replied that I was unwilling to give out copies to unknown recipients but that he was free to make tape dubs of his copy of the CD. The packaging states that not-for-profit dubbing is encouraged. Get more copies out there.

This was a funny moment because I was talking to the one guy in Canada to whom any kind of tape copying is an inconceivable perpetration of immoral behavior. In CRIA's eyes the average consumer, more than half of whom condone home taping, is a pirate. Their latest solution to this crime wave is to lobby for the instigation of a royalty tax of 50¢ on every blank cassette tape sold to non-industry individuals. So even if you're recording baby's first words or yourself playing an improvisation on the bazoozophone, Michael Jackson and the other constituents of that aforementioned 1% will get money for the record they didn't sell.

So Mr Robertson, somewhat aghast, said he'd call me back. But this dubbing idea was the last straw and he never did call me back.

Next I heard that someone was hassling the CD plant that pressed *plunderphonic*. How could they perpetrate such a desecration of those who provided their main bread-and-butter, or something like that. This plant was, in my experience with them, not very organized, and so somehow they had manufactured this package that clearly listed credits for a lot of familiar names, had NOT-FOR-SALE indications on the disc and cover and even called for the specific disabling of the copy-protection flag that is included in the digital encoding of almost every CD. These materials sat on their premises for two months and then were finally processed and replicated; a task which takes a couple of hours. The one thing they didn't have was the Michael Jackson image, which was being printed elsewhere. They even got a copy of a big article in the Globe & Mail by Robert Everett-Green with the title "Blurring the line between thieving, copying and creating"[3]. But they claimed to be unaware of the nature of the project and asked me for a letter absolving them of any apparent intelligence.

Several weeks later I received a letter from CRIA's lawyers, in which they stated that it was irrelevant to them that I was not selling the *plunderphonic* CD; they considered it to be an infringement of their clients' copyrights and therefore I should acknowledge their letter so that they could proceed to undertake to recall all copies of said CD. The letter included some massive grammatical blunders like this sentence: "Neither Michael Jackson nor CBS Records we understand have not granted permission to Mystery Laboratory to use either the Michael Jackson recording of *Bad*, or the photo or name of Michael Jackson." So taking the double negative literally, I was sanctioned.

Alas, errant English wasn't much of a legal defence. At first I was surprised that CRIA considered itself in a position to exert a moral copyright claim. *(Canadian)* Copyright roughly covers two distinct areas: one's financial control over a piece of creative property, and one's control of matters of morality in relation to that property. By stating that the financial circumstance was irrelevant, CRIA was implying that they would be taking a moral stand; something along the lines of my mutilating Michael Jackson's image, or my defaming him, or my misleading his fans. To give you an example of this sort of thing: the only successful exercising of moral copyright in Canada, at least prior to last years revisions of the Canada Copyright Act, was the case of Michael Snow suing Cadillac-Fairview for tying ribbons around the necks of his goose sculptures in the Eaton Centre. That's a case of an artist claiming that his work was being defaced and his copyright infringed.

Did anyone note the irony of Michael Snow being one of the guest musicians on your release?

All the copyright lawyers were familiar with this case. They'd raise their eyebrows when I would point out Mike's name in the credits.

My assumption up to this time was that if there was to be a contention of moral copyright infringement in relation to Michael Jackson's image it would have to be by Michael Jackson himself. That's his copyright, not CRIA's. My calculation was that even if he didn't like *plunderphonic*, which I was trying to get to him with the optimistic notion that he would be flattered; even if he hated it, he wouldn't try to sue me because this would create a lot of publicity for this little project which no one might notice otherwise, and besides, what would it look like for a billionaire pop star to sue a guy who was giving away a handful of free CDs.

But I did some reading and discovered that in Canada with the new copyright revisions, "Contrary to the notion that moral rights pertain to an individual creator, corporations will apparently benefit from the enhanced moral rights provisions in the case of photos and sound record-

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2. Brian Robertson in conversation with Robert Everett-Green. Mr Robertson said he would have pursued his against the *plunderphonic* CD even if the offending cover was removed. Mr Green wrote the first review of *plunderphonic* (see next item) and the first editorial speculating on its legal problems, *Who's manning the barricades between art and commerce?*, Globe & Mail, January 20th, 1990, p.C14.

3. Globe & Mail October 14th,1989, p.C9. "An incidental effect of the no-sale policy is to remove (Oswald's) work from the legal scrutiny of the artists he has plundered, especially the tiny surgery-obsessed singer whose hit single is thoroughly revamped on the disc, and whose image is 'sampled' on its cover."

ings where...the current act fictionally deems them authors of these works"[4]. So, I assume as long as Michael Jackson didn't complain about this, CRIA would claim the rights to *Bad* as its fictitious author.

Is there any legal protection for the sort of thing you do?

I suppose in some countries it could be defended on the grounds of being parody. The aspect of parody seems to be more definitely protected in the U.S. law than in Canada, where I don't remember it being mentioned. There's less value in a sense of humour up here, legally speaking.

But the idea of legal protection is dependent on how much time and money you're willing to invest to establish your eligibility for that protection. One lawyer I consulted actually speculated that since there wouldn't be any hope of my adversaries recouping legal costs in a case against a pauper like me, that it was more likely that they would send someone around to beat me up or otherwise harass me, in order to convince me not to waste their time and money. I decided to try to negotiate.

But this sort of decree, that your music is illegal, will restrict your right to create the sort of music that you do.

First of all, only Brian Robertson and CRIA's lawyers have *claimed* that its illegal. Nothing has been tested in court. It remains innocent until proven guilty. I haven't agreed to anything which compromises the integrity of the project. Secondly, I'm perfectly free to continue to create this sort of transformational appropriation of music. I can continue to make these things. The one thing that has been compromised is the distribution of my creations. I'm sure CRIA will be interested in inspecting any recording I might put out in future. And I get requests for material from various record companies which now always include some sort of qualification about it being devoid of *plunderphonics*.

I should go on to say what happened next. According to the letter I received I was to cease and desist distribution of the disc by December 24th or there would be trouble without prior notification. So they didn't want me giving it out as Xmas presents. I got a lawyer to assess the letter, a couple of more lawyers to chat with me about morality and copyright, and then, by recommendation, a rather expensive lawyer who I wasn't paying for philosophy. His job was to make CRIA happy quickly, but within certain limitations. These limitations included leaving those copies of the CD which already had been distributed alone. I was unwilling to undertake or participate in a recall. Neither was I willing to admit to any infringement.

The one concession that seemed to interest CRIA the most was making CDs available for destruction. I am less than devoted to the task of distribution in the first place, so the idea of unloading the few copies I had left in my possession wasn't too painful. And the fact that CRIA, CBS and the Jackson corporation wanted to become the modern day equivalent of book burners seemed like an appropriate way to let them present themselves. So CRIA's lawyers and my lawyer agreed to exchange all the discs I had left, plus master tapes, for crushing, plus my agreement that I wouldn't manufacture or distribute anymore of these discs. This happened.

The master tapes were destroyed!?

In the first week of February. Considering that each copy of the CD is soundwise, a virtual clone of the master, the original tapes are redundant. The interesting aspect was that although as a result of the agreement I had no copies of my recording, I could always go over to the library and listen to it.

Following the exchange of these material manifestations of my artistic efforts I sent out press releases to wire services and the news media, and thereafter got out of the *plunderphonic* distribution non-business.

The press release included CRIA's phone number. I was hoping they would get more publicity from their actions than I would, and let public opinion of the event fall where it may. One of the local dailies picked it up for a feature item[5]; and there was an editorial in alocal weekly[6]; I got phone calls from a couple of magazines in England; Brian Robertson and I were individually interviewed a few times for radio; the *Brave New Waves* show on the CBC sent out *Free John Oswald* buttons; and that was all that happened, until lately, two months later. The info seems to have just sunk in because now I'm getting lots of phone calls from the press and radio. It's no longer a news item. Now it's this historical bit which is getting mentioned retrospectively. I also get several dozen letters a week from individuals, radio stations, and libraries, mostly hopeful that they somehow can still get a copy of the disc.

You've said that you can continue to make *plunderphonics*, but since you can't distribute it it's unlikely that we'll hear any of this material.

This depends on how enterprising a potential distributor is. Even if we stick to the existing *plunderphonic* CD, the case is not closed. Opinions differ on its commercial viability. The executive producer of the major U.S. new music label called to say they'd put it out in a minute if they thought it was possible. Other music industrialists have discussed the feasibility of putting it out in a country where the copyright laws are different. There's a definite possibility of licensing some of the material, to be combined with other material, undoubtedly without a naked Michael Jackson on the front, as a commercial release.

What is your position on these proposals?

I don't have one. Right now I'm just listening to what these guys have to say. It's conceivable that the parties who demanded the destruction of *plunderphonic* would be affiliated to its re-release. It would be very interesting to compare a sanctioned, sanitized version to the original, which is relatively uninhibited by the practical considerations of being a commodity.

But don't you have to make an effort to protect your creative endeavours?

I'm an unwilling promoter. I dislike politicking for art. I prefer to sidestep issues. *plunderphonic* still exists. It's a pop record, by virtue of the presence of some of the well-known personalities featured on it.

It's a pretty weird pop record!

The things that catch my interest in the morass of the media are those items which defy categorization, however briefly[6]. *Plunderphonic* would be considered to be obsessively unpop except for its pervasive reliance on pop music for its sound. This sound or comprehensibility is apparent to a broad range of listeners. It has pop credentials. Categories aside, its distribution is now in the hands of the public, and its persistence will depend upon their interest. If someone wants a copy badly enough, they'll probably be able to find a copy. But it won't be spoon fed to them. They'll have to forage for it. ▲

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4. *Recording industry crushes composer's project* by Chris Dafoe, Toronto Star, February 9th, 1990, p. D20, in which Brian Robertson is quoted as saying *"(Oswald) took sampling fifty times past what we have come to expect. That together with the graphics made it necessary that we do something."*

5. *Plunder Blunder* by Bill Reynolds, Metropolis, February 15th, 1990. *"If Oswald committed any indiscretion against the prevailing order, it was to subvert the usual architectectonic of retail market distribution systems with an electronic surgeon's precision and an academic fastidiousness that bamboozled the image makers, bean counters and guard dogs of the multi-billion dollar recording industry."*

6. *"The very notion of categories runs contrary to art, for art is process and conforms to no rules."* from *20th Century Music: The Impoverishment in Copyright Law of a Stategy of Forms* by Janet Mosher, *Intellectual Property Journal*, v.5.

G. Renaming That Tune: Audio Collage, Parody, and Fair Use by Alan Korn (1992)

RENAMING THAT TUNE: AUDIO COLLAGE, PARODY AND FAIR USE

Alan Korn

Recording has always been a means of social control, a stake in politics, regardless of the available technologies. Power is no longer content to enact its legitimacy; it records and reproduces the societies it rules. Stockpiling memory, retaining history or time, distributing speech, and manipulating information has always been an attribute of civil and priestly power, beginning with the Tables of the Law. But before the industrial age, this attribute did not occupy center stage: Moses stuttered and it was Aaron who spoke. But there was already no mistaking: the reality of power belonged to he who was able to reproduce the divine word, not to he who gave it voice... on a daily basis. Possessing the means of recording allows one to monitor noises, to maintain them, and to control their repetition within a determined code. In the final analysis, it allows one to impose one's own noise and to silence others[1].

I. INTRODUCTION

Throughout history, changes in information technology have altered how individuals within society perceive, and in turn, represent the world around them[2]. One important example is Edison's invention of the phonograph, patented in 1877. Edison's invention allowed for the recording of any sound that could be made, marking a qualitative advance over earlier methods of stenographic and musical notation[3]. In the century since Edison's invention, advances in analog and digital recording continued to refine the quality of sound reproduction, further transforming the way sound is composed, recorded and consumed by its audience[4]. Today, almost all popular music is recorded in multi-track recording studios, using state-of-the-art computer technology to shape and reshape discrete "bits" of musical information. In addition, sophisticated methods of manipulating sound in the recording studio have led to an increased "plasticity"[5] of sound, enabling musicians to produce works which seemingly resemble those of other 20th century visual artists. Nowhere is this resemblance more evident than in the art of musical collage.

Like musicians, visual artists have historically (re)presented the world around them, quoting past works and other artists in the process. In addition, musicians and visual artists commonly experiment with new technologies to more effectively interpret the world around them. Musicians and visual artists also frequently quote one another by way of homage, allusion and parody; a practice extending from the early quodlibet[6] to more recent disco medleys of Beethoven "hits." While copyright law has traditionally distinguished between homage, parody and outright plagiarism, today the line distinguishing these practices is less clear. Moreover, recent advances in digital sound reproduction threaten to push these tensions within copyright law to their limit, in some circumstances even chalenging traditional notions of what constitutes originality in music[7].

A. John Oswald and *Plunderphonic*

The controversy greeting the Canadian composer John Oswald's 1989 CD release, *Plunderphonic*, reveals how uncertain the borders between originality and plagiarism have become. Oswald's *Plunderphonic* was based on the electronic manipulation of 24 pre-existing compositions in a variety of unconventional ways[8]. Oswald pressed 1,000 copies of his *Plunderphonic* CD in October 1989 and distributed these to libraries, radio stations and the artists who had been quoted[9]. At no time were any copies of *Plunderphonic* offered for sale. Nevertheless, the distribution of *Plunderphonic* was disrupted when the Canadian Recording Industry Association (CRIA) voiced their objections to Oswald's treatment of the Michael Jackson composition *Bad* (retitled *Dab*). CRIA charged that *Plunderphonic* unlawfully infringed upon this Michael Jackson recording[10]. Subsequent negotiations with CRIA and their attorneys led to a settlement, with Oswald and CRIA agreeing to destroy the master tapes and remaining undistributed copies[11]. The ensuing settlement created substantial publicity for Oswald, due in part to the challenging

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1. J. Attali, *Noise: The Political Economy of Music* 87 (1985)
2. See M. McLuhan, *Understanding Media: The Extensions of Man* (1964) for analysis into how changes in communications technology have correspondingly shaped our social and cultural relations.

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3. C. Cutler, *File Under Popular: Theoretical and Critical Writings on Music* 141 (1985)
4. For an overview of recording technology's effect on the production and appreciation of music since the introduction of Edison's phonogram, see E. E isenberg, *The Recording Angel* (1987).
5. *Music recording as a form of culture production also results from plasticity, the ability to manipulate sound physically. The process of music recording - the technology of plasticity - is the site of the musician's interaction with the administrators of the mass culture industries who desire replicability.* Tankel, *The Practice of Recording Music: Remixing as Recoding*, J. Comm, Summer 1990, at 36.
6. Quodlibet is a humorous form of composition from the 15th - and 16th -century constructed entirely of borrowed melody. A well -known example of quodlibet is found in the last variation of Bach's *Goldberg Variations*, which integrates two popular melodies from his day, *Long Have I Been Away From Thee* and *Cabbage and Turnips* within the composition's theme. *Harvard Dictionary of Music* 713 (2d ed. 1969).
7. Pareles, *Digital Technology Changing Music*, N.Y. Times, Oct. 16, 1986, Sec. C, at 23, col. 4.
8. Artists "sampled" on *Plunderphonic* include Michael Jackson, Metallica, Dolly Parton, 101 Strings Orchestra, Igor Stravinsky, Count Basie, The Beatles, George Martin, Captain Beefheart, Bing Crosby, George Harrison, James Brown, Public Enemy, Dick Hyman, Cecil Taylor, Franz Liszt, Bix Biederbeck, Ludwig Van Beethoven, Glenn Gould, Verdi and Anton Webern.
9. Richardson, *The Plunder King, S.F. Bay Guardian Music Quarterly*, Sept. 12, 1990, at 15, col. 1. Significantly, fewer copies of the CD were in existence than a single record store would sell of a major hit record in a week. Igma, *Taking Sampling fifty times beyond the expected: An interview with John Oswald*, Apr. 1990, at 5. (Photocopy provided by John Oswald during lecture at S.F. Co -Lab, 1990).
10. Igma, *supra*, note 9.
11. About 300 undistributed copies of the *Plunderphonic* CD were eventually destroyed by CRIA. Gann, *Plundering for Art, Village Voice*, May 1, 1990, at 102, col. 3. Oswald opted to destroy all remaining copies of the *Plunderphonic* CD to avoid the risk of costly litigation, and because of the destruction of his work carried a strong symbolic message. Igma, *supra*, note 9.

nature of his work and its non-commercial status. Ultimately the controversy surrounding the official destruction of *Plunderphonic* generated widespread discussion in the music press on the moral and ethical limits of digital sampling[12] and the commensurate threat of artistic self-censorship.

Ironically, several major record labels became interested in Oswald's work following the destruction of *Plunderphonic*[13]. This belated interest in Oswald's work underscores the music industry's ambivalence with regard to compositions incorporating the "text" of other artists. On the one hand, the recording industry benefits from the commercial success of many collage-based rap and "hip -hop"[14] compositions. Yet many within the music industry view these recordings with deep suspicion. Critics of this music have charged that digital sampling constitutes plagiarism, unfair competition, and even "old-fashioned piracy dressed up in sleek new technology."[15] However, while the use of sophisticated digital sampling equipment in the recording studio does warrant some concern, many commentators fail to recognize sampling as a legitimate artform with historical roots in earlier artistic movements which similarly challenged conventional notions of cultural representation.

B. Purpose of Article

Although the unauthorized use of sound recordings in derivative[16] collage compositions may in some instances infringe on the copyright of a given composition or sound recording, such use may in some circumstances be protected under a fair use analysis typically accorded works of parody. Therefore this Article will first provide some historical context for understanding aural appropriation as an evolving 20th century artform with parallels and antecedents in the visual arts. Next comes a discussion of how certain collage-based compositions may violate applicable copyright laws under the 1976 Copyright Act. This Article will then explore whether the appropriation of pre-existing sound recordings may be justified under existing interpretations of fair use as defined in § 107 of the 1976 Act. In particular, I will focus on the defense of fair use as it has historically been applied to works of parody. After evaluating existing limitations in applying a fair use analysis to works of aural collage, this Article will present some final observations, including suggestions offered by various commentators to protect the interests of copyright owners while simultaneously affording protection to collage composers.

II. AUDIO COLLAGE - A HISTORY

"If the word 'music' is sacred and reserved for eighteenth- and nineteenth-century instruments, we can substitute a more meaningful term: organization of sound."[17]

"(With recording) (t)he actuality of performance is not lost, but is freed from time. It can be taken apart. Assembly and shaping of music on tape includes manipulation of the tape itself and of the mediating electronic equipment. Since the development of multi-track recording, the ease of overdubbing, selective addition, erasure and electronic alteration of sound– both before and after registration– has encouraged the use of the studio as an instrument rather than merely a documentary device. Music can be assembled both vertically and horizontally over time, moulded and remoulded. Tape runs forwards, backwards, and at many and variable speeds. It can be cut up and glued together. Moreover, recording is also a medium in which improvisation can be incorporated– or transformed through subsequent work– into composition."[18]

Edison's phonograph was initially designed as an instrument for preservation of sound rather than for its mass replication[19]. The phonograph was intended primarily for stenographic purposes, much as audiocassettes are now used[20].

However, the Victor Company's introduction of the Victrola in 1906 altered the way phonograph equipment was used, by enabling sound recordings by popular artists to be enjoyed at home on a repeated

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12. Digital sampling is a method whereby sound is recorded by a synthesizer which translates these sounds into their binary equivalents. These sounds can then be electronically manipulated, stored or copied onto computer disks, and later played back on a modified keyboard instrument.

13. The executive producer of a major U.S. new music label later called Oswald to say they would put the *Plunderphonic* CD out in a minute if they thought it was possible. Igma, supra, note 9, at 5. In July 1990, Oswald was hired by Elektra records to create a special *Plunderphonic* recording in conjunction with that label's 40th anniversary celebration. Richardson, *supra*, note 9, at 15, col. 2..

14. "Hip Hop" is a phrase describing many of the stylistic innovations located within contemporary African -American culture. While Hip Hop embraces graffiti art, breakdancing, and rap music, Hip Hop music is a distinct, rhythmic, urban sound commonly incorporating a variety of collage techniques. For a history of the New York Hip Hop and Rap music scene, see S. Cosgrove, *The Rap Attack - African Jive to New York Hip Hop* (1984).

15. See, e.g. *Comment, Digital Sampling: Old - Fashioned Piracy Dressed up in Sleek New Technology*, 8 Loy. Ent. L.J. 297 (1988). See also: *Note, You Can't Always Get What You Want But Digital Sampling Can Get What You Need*, 22 Akron L. Rev 691 (1989) (Digital sampling poses a threat to the recording industry and the livelihood of musicians); *Comment, Digital Sound Sampling, Copyright and Publicity: Protecting Against Electronic Appropriation of Sounds*, 87 Colum. L. Rev. 1723 (1987) (Digital sampling represents a threat to the livelihoods of increasing numbers of acoustic musicians); *E.S. Johnson, Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 1988 *Entertainment, Publishing and the Arts Handbook* (1988) (Digital sampling creates new types of theft, from outright infringement of the underlying composition and sound recording to unauthorized commercial exploitation of the performer's distinctive sounds).

16. A derivative work is defined under the Copyright Act as "a work based upon one or more preexisting works . . . ." 17 U.S.C. § 101 (1991).

17. J. Cage, *Silence 3* (1961).

18. Cutler, *supra*, note 3, at 142 -43.

19. Attali, *supra*, note 1, at 91. In 1890, Edison wrote:

In my article of 12 years ago I enumerated among the uses to which the phonograph would be applied: 1. Letter-writing and all kinds of dictation, without the aid of a stenographer. 2. Phonographic books, which would speak to the blind people without effort on their part. 3. The teaching of elocution. 4. Reproduction of music. 5. The "Family Record," a registry of sayings, reminiscences, etc., by members of a family, in their own voices: and of the last words of dying persons. 6. Music boxes and toys. 7. Clocks that should announce, in articulate speech, the time for going home, going to meals, etc. 8. The preservation of languages, by exact reproduction of the manner of pronouncing. 9. Educational purposes: such as preserving the explanations made by a teacher, so that the pupil can refer to them at any moment; and spelling or other lessons placed upon the phonograph for convenience in committing to memory. 10. Connection with the telephone, so as to make that invention an auxiliary in the transmission of permanent and invaluable records, instead of being the recipient of momentary and fleeting communications. Every one of these uses the perfected phonograph is now ready to carry out. I may add that, through the facility with which it stores up and reproduces music of all sorts, or whistling and recitations, it can be employed to furnish constant amusements to invalids, or to social assemblies, at receptions, dinners, etc... Music by a band– in fact, whole operas– can be stored up on the cylinders, and the voice of Patti singing in England can thus be heard again on this side of the ocean, or preserved for future generations. T.A. Edison, *The Phonogram*, 1 -3 (1891-93) (cited in Attali, *supra*, note 1, at 93 - 94).

20. In fact, it was not technically feasible to record sounds other than speech prior to 1910. Only a few operas were recorded at that time, and the first symphony was not recorded until 1914 (Beethoven's Fifth, directed by Artur Nikish). *Id.* at 92.

basis. As consumer interest in commercial recordings took shape, artists also developed an interest in sound recordings as found objects. By 1922 Laszlo Moholy-Nagy was advocating the manual manipulation of audio phonorecords to produce (as well as reproduce) original and mimetic sounds[21]. Kurt Schwitters was another early artist to approach the phonograph in terms of musical production, as well as reproduction. At a time when recordings were still made on wax cylinders, Schwitters dubbed these recordings onto film, later editing the film into audio collage pieces[22]. Early audio collage experiments by members of the Italian Futurist[23] movement also prefigured later composition techniques which resulted from the introduction and mass distribution of audio tape recorders and later, digital sampling devices[24].

Audio fidelity of phonograph records became greatly enhanced following the introduction of electronic recording equipment into the recording studio. Analog magnetic tape recorders[25], microphones and console boards gave the audio producer greater discretion in recording and balancing sound, and the role of production gradually took on greater importance[26]. The manipulation of audio tape and the use of increasingly sophisticated mixing and sound processing equipment freed composition and performance from their temporal restraints[27]. Multi-track recording equipment allowed producers to add to, erase and electronically alter sound during the recording process, enabling composers to use the recording studio as another instrument rather than as a method of strict documentation[28]. As a result, the recording studio gradually took shape as the primary locus of compositional activity[29]. In addition to shaping the production of music, improvements in analog and digital recording became crucial in reshaping the relationship between music and its audience[30].

After World War II composers began exploring new types of music based on the manipulation of magnetic audiotape. This music became known as *musique concrete*[31]. Pierre Schaeffer of France is frequently credited as the father of musique concrete although the genre was influenced by artists in America, Europe and Japan. While the first *musique concrete* works were produced on phonographic disc cutting equipment[32], analog tape recorders later provided composers with greater expressive freedom[33]. As Schaeffer himself put it, "(f)rom the moment you accumulate sounds and noises, deprived of their dramatic connotations, you cannot help but make music."[34]

With the development of *musique concrete*, compositions incorporating audio collage techniques soon filtered into American popular music. These popular recordings frequently used collage techniques for purposes of novelty or parody. Slapstick novelty recordings by Spike Jones later gave way to edited gags such as Buchanon and Goodman's "Flying Saucer" recordings from the 1950s[35]. The orchestral compositions of Carl Stalling for Warner Brothers' animated cartoons during the 1940s and 1950s also utilized "cut and paste" studio techniques to create densely layered works of pastiche and parody[36].

Audio collage techniques continued to integrate elements of mainstream culture

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21. Concannon, *Cut and Paste: Collage and the Art of Sound, Sound by Artists* 178 (1990).

22. *Id.* at 167.

23. The Futurists, led by Filippo Tommaso Marinetti, were an early 20th Century art movement, whose "sound poetry" was similar to the nonsense poetry advanced by the Dada movement. *Id.* at 163-64. Luigi Russolo's Futurist tract entitled *Art of Noises* (1913) is an important document in the development of musical collage. "The Art of Noise" was also the name of a popular recording group from the early 1980s which utilized digital sampling and other collage techniques.

24. *Id.* at 163.
The development of early audio collage pieces followed innovations in the visual arts, particularly the photomontage developed by George Grosz and John Heartfield in 1916. The term *photomontage* was coined by the Berlin Dadaists to describe a collage technique involving the use of photographs, advertisements, newsprint and drawings to form original works of art. Cutting out and reassembling photographic images was previously a popular technique found on comic postcards, photograph albums and military mementos. D. Ades, *Photomontage 7* (1976). Photomontage techniques also resembled the Dada poetry developed by Hans Arp, Tristan Tzara and Kurt Schwitters. Dada poetry was constructed from random sentences taken from newspapers, scraps of paper and cliches taken out of context in order to wrench words from their usual meanings. *Id.* at 8. The Dadaist technique of appropriation was later perfected by Marcel Duchamp's in *L.H.O.O.Q.* (1919), wherein Duchamp superimposed a mustache on a reproduction of Da Vinci's *Mona Lisa*. This metaphorical act of vandalism, involving the juxtaposition of familiar images, re-inscribed the portrait with new meaning in keeping with the Dadaist attack on the reification of art.

Appropriation of the imagery of popular culture within the visual arts became commonplace following the Pop Art explosion of the 1960s. Andy Warhol, the most celebrated of these artists, drew from his own experiences of daily life within a mass consumer society. Warhol's preoccupation with the products of American mass culture, from soup cans to celebrities, found a corresponding affirmation in the works of Rauschenberg, Jasper Johns, Claus Oldenberg, Roy Lichtenstein and others. The appropriation of mass cultural imagery continues through the present day, and is found in sculptural works by Jeff Koons, paintings by Kenny Scharf and David Salle, and the photography of John Baldessari, Sherrie Levine and Richard Prince. The appropriation of pre-existing material for artistic uses is also commonplace within other artistic disciplines. T.S. Eliot, William Burroughs, Bryan Gysin and Kathy Acker have utilized appropriated text in their literary works. Video works by Dana Birnbaum utilize network programming to dissect the conventions and ideological functions of specific television genres, while the *Paper Tiger Television* broadcasting collective uses appropriated news footage to critique the ideological underpinnings of American network television. The use of appropriated material has long played an important role in the new cinema, as seen in the work of Jean Luc Godard, Bruce Conner and Craig Baldwin. Comic artists Art Spiegelman and Bill Griffith also incorporate appropriated imagery into their drawings to create visually stimulating and innovative works. For a detailed legal analysis into appropriation, the visual arts, and assorted copyright and trademark concerns, see J. Carlin, *Culture Vultures: Artistic Appropriation and Intellectual Property Law*, 13 Colum. J.L. & Arts 103 (1989). See also *Note, Copyright, Free Speech and the Visual Arts*, 93 Yale L.J. 1565 (1984).

25. Analog tape recorders use audiotape to store information transmitted via a continuous series of magnetic impulses.

26. See Eisenberg, *supra*, note 4, at 124. Eisenberg credits Thomas Edison as the first popular producer for initially convincing popular artists to stand in front of a horn and reproduce a single performance hundreds of times while fussing with the equipment. *Id.* Eisenberg acknowledges that Edison was half-deaf, had delicate ears, and fiercely bad taste, once admonishing Rachmaninoff "Who told you you're a piano player?"

27. Cutler, *supra*, note 3, at 142-43:
Current sound processing technologies also allows the recordist to vary the basic elements of sound: volume (potentiometer), dynamic range (compressor/limiter), pitch (harmonizer), timbre and balance (equalizer), duration (technological variation of delay, reverberation, echo, speed), and spatial imaging (including the selection of monaural, binaural, stereophonic, quadriphonic, surround-sound). Microphone selection and placement and the use of the studio's acoustic space also influence the sound as recorded. The recordist edits the performances– deleting, adding, combing, rearranging, or reversing the direction of the sound– by reordering pieces of tape with razors and splicing tape (physical editing) or using multiple recorders (multimachine rolldown); in digital recording these functions are performed electronically.
Tankel, *supra*, note 5, at 37.

28. Cutler, *supra*, note 3, at 142-43. The vocal echo on Elvis Presley's early Sun recordings is cited by composer Brian Eno as an early instance of studio technology reshaping the sound and texture of popular music. Lecture by Brian Eno, University of California at Santa Cruz, 1980.

throughout the 1960s and 1970s. Minimalism, Pop Art and pop music merged in James Tenney's *Collage 1* (1961), constructed from razor blades and an audio tape of Elvis Presley singing the Carl Perkins hit *Blue Suede Shoes*[37]. The Beatles' *Revolution #9* (1968) also contained dozens of unauthorized fragments taken from radio and television broadcasts[38]. In the 1970s and 1980s, popular recordings by Holgar Czukay, Brian Eno and David Byrne incorporated "found" fragments from shortwave radio broadcasts[39]. Similarly, in the 1980s works such as Douglas Kahn's *Reagan Speaks for Himself* (1981), Bonzo Goes to Washington's *Five Minutes* (1984) and Double Dee and Steinski's *Motorcade Sped On* (1987) manipulated audio newscasts into incisive works of social commentary, the audio equivalent of John Heartfield's 1930s anti-Nazi photocollage assemblages[40].

III. MODERN COLLAGE FORMS: DANCE, RAP AND HIP -HOP

Concern over copyright infringement with respect to audio collage recordings has arisen most frequently in response to commercially successful dance and hip-hop compositions fashioned out of snippets of pre-existing recordings. Many of these compositions are derived from the New York street scene of the mid- to late-1970s where African-American youth developed and popularized innovative forms of cultural expression, including break dancing, rap music and graffiti art. On the streets and in the clubs, disk jockeys from the Bronx kept dance rhythms going by "cutting" back and forth repeatedly between the instrumental breaks of the same record on two separate turntables[41].

The first commercial success of a disk jockey "mastermix"[42] was Grandmaster Flash's *The Adventures of Grandmaster Flash on the Wheels of Steel* (1981). *Adventures...* was a pioneering work that incorporated snippets of contemporary sound recordings by Blondie (*Rapture*), Queen (*Another One Bites the Dust*) and Chic (*Good Times*)[43]. While *Adventures...* remains one of the few mastermixes recordings commercially released[44], techniques pio-

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[29] The Beatles, whose *Revolution #9* introduced audio collage techniques to a vast audience, eventually abandoned live performance for the recording studio after admitting the impossibility of reproducing their unique "sound" in live performances.
The recording studio was also the birthplace of a popular genre of reggae called "dub," based entirely on the electronic manipulation of previously recorded rhythm tracks. This music was popularized by famous Jamaican producers such as Lee Perry and King Tubby: *"(King Tubby) used eight-track tapes to produce the initial dub effects, but because of its lack of technical precision, he soon gave it up. Echo units and reverb were subsequently used– these would add echo to a singer's voice, for example. Certain words uttered by the singer would reverberate as though he were speaking in a hollow cave. The 'dub' would entail adding tape echo fed into the mixing board by a revox two-track machine at a speed (usually) of three and three-quarter i.p.s. The engineer would then move the dub button from its upward position downwards, and this sudden cutting effect of the guitar from the tape would create a spiralling, reverberating effect. The engineer could also feed the tape echo into a phaser, which was then fed into the mixing board to create other effects. The phaser could be tuned to a desired effect and the snare drum, for example, could produce an eerie or weird– but highly danceable– effect."* S. Clarke, *Jah Music* 130 -31 (1980).

[30] For instance, where musicians previously used the recording medium to fix their musical performances for posterity, a performance increasingly is valued only as a simulacrum of the sound recording. Attali, *supra*, note 1, at 85.

[31] *"Musique concrete means an electronic music consisting of a collage of real, or 'concrete' sounds; in other words, of sounds recorded and then manipulated and juxtaposed in various ways."* J. Rockwell, *All American Music: Composition in the Late Twentieth Century* 154 (1984).

[32] Kahn, *Audio Art in the Deaf Century, Sound by Artists* 303 (1990).

[33] American composer John Cage suggests that with a minimum of 2 tape recorders and a disk recorder, the following processes are possible: *"1) a single recording of any sound may be made; 2) a recording may be made, in the course of which, by means of filters and circuits, any or all of the physical characteristics of a given recorded sound may be altered; 3) electronic mixing (combining on a third machine sounds issuing from two others) permits the presentation of any number of sounds in combination; 4) ordinary splicing permits the juxtaposition of any sounds, and when it includes unconventional cuts, it, like rerecording, brings about alterations of any or all of the original physical characteristics. The situation made available by these means is essentially a total sound-space, the limits of which are ear-determined only, the position of a particular sound in this space being the result of five determinants: frequency or pitch, amplitude or loudness, overtone structure or timbre, duration, and morphology (how the sound begins, goes on, and dies away). By the alteration of any one of these determinants, the position of the sound in sound-space changes. Any sound at any point in this total sound-space can move to become a sound at any other point. But advantage can be taken of these possibilities only if one is willing to change one's musical habits radically."* Cage, *supra*, note 17, at 8 -9.

[34] Diliberto, *Interview: Pierre Schaeffer & Pierre Henry: Pioneers in Sampling, Electronic Musician*, Dec. 1986, at 56.

[35] These narrative recordings consisted of a fictional newscaster interviewing "alien" platters from outer space, typically snippets of hit recordings of the period, such as *I Hear You Knockin'* and *Earth Angel*. Unamused copyright owners soon forced Buchanon and Goodman to arrange royalty agreements for use of these tunes. In his later parody recordings Goodman regularly obtained licenses to satisfy record company concerns. Gordon & Sanders, *When Parodies Use Musical Allusion to Copyrighted Works*, N.Y.L.J., Feb. 8, 1991, at 7, col. 1

[36] Stalling's work had a profound impact on key figures in the New York "downtown" music scene of the late 1970s and early 1980s such as John Zorn, Christian Marclay, Laurie Anderson and others.

[37] Oswald cites Tenney's *Blue Suede Shoes* as fulfilling Milton's stipulation that piracy or plagiarism of a work occurs only if it is not bettered by the borrower. Oswald, *Bettered by the Borrower: Copyrights and Music Composition, Whole Earth Review*, Dec. 22, 1987, at 104.

[38] Id.

[39] Holgar Czukay studied under the electronic composer Stockhausen and was a member of the progressive rock group Can. Brian Eno, a founding member of the 1970s band Roxy Music and an influential producer and solo recording artist, teamed up with David Byrne of the band Talking Heads to produce a popular LP entitled *My Life in the Bush of Ghosts* (Sire, 1981) which prominently featured "found" radio text.

[40] These artists seemingly took to heart Frankfurt School theorist Walter Benjamin's observation that "Fifty years ago, a slip of the tongue passed more or less unnoticed. Only exceptionally may such a slip have revealed dimensions of depth in a conversation which had seemed to be taking its course on the surface." W. Benjamin, *The Work of Art in the Age of Mechanical Reproduction, Illuminations* 235 (1968)

[41] Disk jockeys such as Cool D.J. Herc, Eddie Cheeba and Starski became celebrities by assembling and reassembling improvised sonic collage pieces for dance crowds. Their techniques are described as follows: *"A disk jockey uses two turntables, amplified through a public-address system. The Technics SL1200 model is preferred for its direct-drive mechanism, which allows the record to begin spinning at normal speed after the D.J. releases it. Copies of the same record are often placed on both turntables and played simultaneously. The D.J. uses a mixing console to blend the signals from each through the sound system. By slowing one record slightly, both are thrown out of sync, producing a phasing effect. "Cutting," the popular technique of manually manipulating a disk on one turntable while the same record plays normally on the other, makes the music stammer. Placing a different record on the second turntable allows the D.J. to add such ingredients as saxophone honks, James Brown whoops or sound effects. Using the mixer, the D.J. can switch between turntables and an unused silent channel. Using this technique, called transforming, he chops legato sounds, such as swooning strings or purring synthesizers, into Morse code-like dashes of noise."* Dery, *Now Turning the Tables...the D.J. as Star*, N.Y. Times, Apr. 14, 1991, Sec. 2, at 28, col. 4.

[42] A mastermix is a new version of a dance record created by intermixing new sounds and audio fragments from other records.

neered by Grandmaster Flash and other DJs continue to have enormous impact on American popular music. Disk jockeys today have emerged as primary instrumentalists, possessing distinctive styles and techniques within the genres of rap, techno and hip-hop. Recent English and European pop groups have also responded to these American innovations by incorporating disk jockeys into their own recorded and live performances[45].

Widespread use of the digital sampling equipment in the 1980s enabled avant garde collage techniques to enter the musical mainstream. While the digital sampler is not a new instrument *per se* (historical antecedents included Frederick Sammis' 1936 photoelectric "Singing Keyboard,"[46] the Optigan,[47] and the Mellotron[48]) its influence on popular music recalls the impact of the electic guitar on the popular music of an earlier generation.

Ease of use, improved audio fidelity, and low cost allowed digital samplers to become a primary instrument within contemporary music[49]. Essentially, digital sampling permits musicians, producers and engineers to replicate desired sounds more efficiently[50]. However, while digital sampling devices have expanded the horizons of musical possibility, they are in many ways merely a technical refinement of Edison's phonograph– a mechanical device that more effectively enables the user to record and reproduce the sounds and noise of everyday life. Ultimately, it is this mimetic function of phonographic and digital sampling equipment which created a popular groundswell of interest in multilayered audio compositions, particularly with respect to dance, rap and hip-hop recordings.

Concern over possible copyright infringement has grown as composers with roots in the avant garde, dance, rock and hip - hop music cultures continue to refine the promise of these early 20th Century tape collages. Although digital sampling equipment can accurately reproduce the sounds of acoustic instruments, choirs and even entire orchestras, the instrument's ability to reproduce the identifiable sonic characteristics of popular recordings and recording artists is what proves most worrisome to legal experts. Because litigation over digital sampling has focused primarily on the use of pre-existing sound recordings in derivative collage compositions[51], it is essential to understand applicable copyright laws governing the artistic practice of audio collage[52].

IV. AUDIO COLLAGE AND COPYRIGHT IN COMPOSITION AND SOUND RECORDINGS

Copyright protection currently extends to sound recordings[53] and musical compositions (including lyrical accompaniment)[54]. Congress first extended federal copyright protection to musical compositions in 1831, granting copyright owners of a composition the exclusive right to sell copies of the musical score[55]. By the late 19th century, the demand for sheet music was lessened following the introduction of player pianos and other devices permitting the mechanical reproduction of compositions, thereby diminishing the value of musical copyrights. The Supreme Court addressed this issue in *White-Smith Music Publishing Co. v. Apollo Co*[56]. Here, the Court held that piano rolls were not "copies" within the meaning of the Copy-

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43. Although different in effect, the manipulation of turntables on *Adventures...* is similar in approach to John Cage's piece for two phonographs entitled *Imaginary Landscape #1* (1939). Cage's composition however relied on sounds made for test purposes by the Victor Company. Like many latter day hip-hop artists, Cage's played these records in conjunction with other instruments. See Cage, *John Cage on Radio and Audio Tapes, Sound by Artists* 289 -90 (1990).

44. See Christgau, *Down by Law: Great Dance Records You Can't Buy, Village Voice*, Mar. 28, 1986, at 39, col. 4. (Describing the history of Double Dee and Steinski's *The Payoff Mix*, an critically acclaimed audio collage never officially released due to administrative problems in securing releases from "appropriated" artists). See also Prevost, *Copyright Problems in Mastermixes*, 9 Comm. & Law 3 (1987) (Focusing on substantial similarity issues and possible fair use defense of mastermixes).

45. For instance, recent live performances by the English Group "BAD II" incorporated guitar-based rock music performed over dance rhythms, all integrated between snatches of recent records spun by an on-stage DJ. Goodwin, *Let the DJ Play, S.F. Bay Guardian*, Oct. 30, 1991, at 50, col. 2.

46. The "singing keyboard" produced unique sounds by activating loops of optical sound film, and was used in Hollywood for commercial purposes. Kahn, *supra*, note 32, at 308. Sammis suggested: *"The instrument will probably have ten or more sound tracks recorded side by side upon the strip of film, and featuring such words as quack for a duck, meow for a dog, the hum of a human voice at the proper pitch, or the twaddle indulged in by some of our tin pan alley song writers." Id.* (citing Rhea, *Photo-electric Instruments*, The Art of Electronic Music 15 (1984)).

47. The Optigan is a keyboard instrument that optically reads a large polyvinyl disc containing different musical "voices".

48. The Mellotron is a keyboard instrument that operated analog tape loops of recorded instruments, orchestras and choirs.

49. Casio's SK -1 digital keyboard featured a built -in microphone and sells for as little as $100.

50. Minimalist composer Steve Reich abandoned his experiments in tape and speech manipulation in the 1960s because of the labor intensive nature of editing audiotape. However, in the 1980s he returned to this form of composition because digital sampling equipment "was physically easier to work with and more musical." Kendall, *Steve Reich: One of Three Profiles of Composers Who Use Computers in Their Work, PC -Computing*, January 1990, at 98.

51. Recording artist Jimmy Castor brought suit against rap artists the Beastie Boys, arguing the band took the words "Yo Leroy" and various drum beats from his *The Return of Leroy (Part 1)*, a follow-up to Castor's 1967 hit *Hey Leroy, You're Mama's Callin' You*. Aaron, *Gettin' Paid: Is Sampling Higher Education or Grand Theft Auto?, Village Voice Rock & Roll Quarterly*, Fall 1989, at 22. Similarly, 1960s recording artists the Turtles brought suit [*Ed. Note: via attorney Evan Cohen of Cohen and Luckenbacher*] against rap band De La Soul for $1 million over the unauthorized use of an organ and string line from their tune *You Showed Me*, which De La Soul slowed down and layered with other material. Pareles, *In Pop, Whose Song is it, Anyway?*, N.Y. Times, Aug. 27, 1989, Sec. 2, at 26, col. 5.
In September 1991, Island Records and Warner/Chappel music publishers brought suit against Negativland, a San Francisco-based collage ensemble, over that band's parody of the 1987 U2 hit *I Still Haven't Found What I'm Looking For*. In October 1991, the parties reached settlement with terms similar to those in the Plunderphonic case. In addition to paying $25,000 and half their wholesale proceeds to settle the claim, Negativland and their small independent record label were required to forward all remaining copies, artwork and mechanical parts to Island Records. Richardson, *Negative Thinking, S.F. Bay Guardian Music Supplement*, Dec. 1991, at 8, col. 1. Ultimately, Negativland expects to lose $70,000 in lost sales, damages and legal fees, more money than the band had made in their previous 11 years of existence. Richardson, *Money for Nothing*, East Bay Guardian, Nov. 1, 1991, at 42, col. 1.
In December 1991, a Federal Judge in Manhattan issued an injunction preventing the sale of an album by rap singer Biz Markie which contained eight bars of a popular 1972 ballad by Gilbert O'Sullivan entitled *Alone Again (Naturally)*. See *Grand Upright Music Ltd. v. Warner Bros. Records Inc.*, 780 F.Supp. 182 (S.D.N.Y. 1991). The judge ruled that Biz Markie's "only aim...was to sell thousands upon thousands of records" and referred the matter to the U.S. Attorney for the Southern District of New York for possible criminal prosecution. *Id.*

52. Use of an underlying sound recording in an audio collage may give rise to several causes of action. In addition to recovery for infringement of copyrights in an underlying musical composition and sound recording, plaintiff may seek to recover for unfair competition, unjust enrichment, misappropriation of personality and tape piracy. An analysis of these latter issues is beyond the scope of this Comment.

right Act[57]. Instead, the Court found that piano rolls and other phonorecords were merely mechanical parts of a machine "which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination."[58]

Congress adapted the Copyright Act of 1909 partly in response to the Supreme Court's decision in *White-Smith Music*. The 1909 Act granted copyright protection to composers of original musical works and defined records and piano rolls as "copies" of the original composition[59]. Under the 1909 Act, reproduction of these copies required payment to the song's copyright owner[60]. However, it was not until the 1971 Sound Recording Amendment that sound recordings were also granted copyright protection.

The 1971 Sound Recording Amendment (later incorporated as Section 114 of the 1976 Copyright Act) was intended to help combat the unauthorized duplication and distribution of popular recordings by record and tape pirates[61]. Today, copyright protection for sound recordings extends only to the particular sounds which comprise the recording, and imitation of a recorded performance will not infringe upon a sound recording, even where the simulation is nearly identical to the original recording[62].

A phonorecord thus contains two copyright interests– a copyright in the sound recording itself, and a copyright in the underlying composition[63]. Artists may legally record and distribute previously published musical compositions if they follow established compulsory licensing procedures and pay the statutory royalty rate[64]. However, there currently exists no compulsory licensing scheme encompassing sound recordings[65].

V. SUBSTANTIAL SIMILARITY AND COPYRIGHT INFRINGEMENT

Any violation of a copyright owner's exclusive rights constitutes an infringement of that copyright[66]. To prove infringement, a copyright owner must establish proof of copyright ownership and proof of copying[67]. Proof of copying may be established either by direct evidence or by indirect evidence showing both access and substantial similarity[68].

Because access to a copyrighted work is easily established when recognizable elements of that work are incorporated into a collage recording, a determination of whether that use is infringing will typically focus on the issue of substantial similarity[69].

A. Substantial Similarity and Popular Music

Determining whether substantial similarity exists is a question of fact[70]. Infringement may occur if an author's labors are substantially appropriated or so much is taken that the value of the original is diminished[71]. Generally, the use of copyrighted material without the consent of the owner is considered unreasonable if it extensively copies or paraphrases the original[72].

With respect to music, infringement occurs "if that portion which is the whole meritorious part of the song is incorporated in another song, without any material alteration in the sequence of bars."[73] Because the most memorable element of a song may be quite brief, cases involving infringement of songs have found "substantial similarity" where quantitatively very little of the song has been copied. Copyright infringement may occur based on the substantial similarity of four bars of defendant's composition[74]. Infringement may also be found based on the substantial similarity of four bars upon which the song's popular appeal and commercial success depends[75]. Similarly, a charge of piracy and infringement may be found in the use of a *single phrase* containing nearly identical accompaniment[76].

Because substantial similarity is necessarily determined on a case-by-case basis, the outcome of any suit involving an audio collage will depend on the use made of the pre-existing work by the composer. If a composer incorporates the "heart" of plaintiff's composition, the taking is likely to constitute copyright infringement[77].

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53. *Id.* at § 102(a). The Copyright Act defines sound recordings as *"works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords in which they are embodied."* *Id.* § 101

54. Exclusive rights granted to the copyright owner include the right to reproduce the copyrighted work in copies or phonorecords, 17 U.S.C. § 106(1) (1991), the right to prepare derivative works based upon the copyrighted work, *Id.* § 106(2), the right to distribute copies or phonorecords of the copyrighted work to the public, and the right to perform, *Id.* § 106(4), and display the work publicly. *Id.* § 106(5).

55. *Goldstein v. California*, 412 U.S. 546, 564 (1973).

56. 209 U.S. 1 (1908).

57. *Id.* at 18.

58. Id.

59. 17 U.S.C. § 1(e) (1909 Act)

60. *Id.*

61. H.R. Rep. No. 92-487, 92nd Cong., 1st Sess., at 6. (Hereafter, *House Report*). The 1971 Sound Recording Act partly addressed the issue of federal preemption which frequently arose in attempts to combat record and tape piracy at the state level. *Id.* at 2-3. This 1971 amendment was later codified under § 114 of the 1976 Act.

62. *Id.* Only those sound recordings fixed in a tangible medium of expression on or after February 15, 1972 are covered by § 114 the 1976 Copyright Act. However, recordings published before this date may still be protected under state statute and common law under § 301(c). *Id.* § 301(c).

63. *Id.* § 102(a)(2) and § 102(a)(7).

64. *Id.* § 115(a). A compulsory license is not available for any arrangement changing the basic melody or fundamental character of a work. 17 U.S.C. § 115(a)(2) (1991). Therefore, a mechanical license cannot be obtained where an artist "quotes" a fragment from a pre-existing composition.

65. Congress has periodically considered a compulsory licensing scheme regulating the public performance of copyrighted sound recordings. To date, no such legislation has ever been passed. A history of these legislative attempts is provided in: *Subcomm. on Courts, Civil Liberties and the Admin. of Justice, Comm on the Judiciary*, H.R. Rep. 95th Cong., 2d Sess., *Performance Rights in Sound Recording* (Comm. Print 1978).

66. *Id.* § 501(a). The 1976 Act provides several remedies to the copyright owner in the event of infringement. The copyright holder may impound infringing articles, *Id.* § 503(a), enjoin manufacture and distribution of a work, *Id.* § 502, obtain actual damages, *Id.* § 504(b), statutory damages, *Id.* § 504(c), and costs and attorneys fees. *Id.* § 505. Statutory damages of up to $20,000 may be awarded upon a finding of infringement. *Id.* § 504(c)(1). In addition, if willful infringement is found, a court may award statutory damages of not more than $100,000. *Id.* § 504(c)(2). Criminal penalties may also apply. *Id.* § 506. These remedies provide strong incentive for copyright holders to pursue litigation over copyright infringement.

67. M. Nimmer & D. Nimmer, *Nimmer on Copyright*, 13.01[A], 13 -4 (1991). *See* 17 U.S.C. § 411 (action for infringement requires copyright registration).

68. *Arnstein v. Porter*, 154 F.2d 464, 468 (2nd Cir. 1946).

69. However, a substantial similarity analysis will proceed only if the sampled portion of the recording is of sufficient duration and originality that it is entitled to protection under copyright law.

70. *Northern Music Corp. v. King Record Dist.*, 105 F.Supp. 393, 397 (S.D.N.Y. 1952).

71. *Folsom v. Marsh*, 9 F. Cas. 342, 348 (CC Mass. 1841) (No. 4,901).

72. *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

73. *Northern Music Corp.*, 105 F.Supp. at 397.

74. *Id.* at 399.

75. *Robertson v. Batten, Barton, Durstine & Osborn, Inc.* 146 F. Supp. 795, 798 (S.D. Cal. 1956).

76. *Boosey v. Empire Music Co.*, 224 F. 646, 647 (S.D.N.Y. 1915).

However, under certain circumstances a *de minimis* infringement of a copyrighted composition may be permitted. As a general rule, "a taking is considered *de minimis* only if it is so meager and fragmentary that the average audience would not recognize the appropriation."[78] A court may find no infringement although the first 16 measures of both songs are substantially alike[79]. However, a parodist's copying of four notes in a 100-measure composition may not be a *de minimis* taking where the musical phrase is the "heart" of plaintiff's composition[80]. Similarly, a parody using the first six of a song's 38 bars may not constitute a *de minimis* taking[81]. In fact, charges of substantial similarity will seldom be rebutted in cases of musical parody, because parodies typically require more than a *de minimis* taking to identify the object of parody[82].

B. Problems with Substantial Similarity Analysis

The copyright scholar Professor Nimmer admitted that infringement analysis is difficult with respect to popular music in that almost all popular compositions bear some similarity to prior works[83]. It is often difficult to separate originality from quotation in popular music. A successful pop song typically balances elements of familiarity and novelty. Pop songwriters frequently pay tribute to their peers and predecessors via allusion, pastiche and mimicry, making it difficult to determine exactly which elements in any given pop song are original[84]. Furthermore, most popular music derives from a variety of musical traditions. Rock and roll "borrows" extensively from black music, country music, folk and Tin Pan Alley. Rap music too borrows heavily from funk, soul, free jazz and the avant garde. There is also a strong tradition of answer songs and parodies in the popular charts, with artists developing specific themes, ideas and melody patterns taken from earlier hit recordings[85].

Parody, mimicry and quotation are musical techniques that significantly predate contemporary forms of popular music[86]. Throughout history, classical composers drew liberally from folk music, popular music and even directly from their peers[87]. But while musical language has an extensive repertoire of punctuation devices, there does not exist a musical equivalent to literature's use of quotation marks[88]. Listeners must rely upon their previous listening experience to extricate the meaning context of a musical quote within any given composition.

Added to this, technical advances in sound reproduction and new forms of musical cross-fertilization have also rendered earlier formulas regarding "substantial similarity" particularly unsuited for addressing modern forms of musical pastiche. Because digital samplers can appropriate infinitesimally small "bits" of information, determining what constitutes an infringing use may prove extremely difficult[89]. Modern studio equipment can easily manipulate source material beyond recognition, and collage artists may recombine discrete elements from various pre-recorded and original sources to create new mosaic -like compositions that while "derived" from many other works may not necessarily be considered a "derivative work" under the Copyright Act[90].

VI. AUDIO APPROPRIATION AND MUSICAL PARODY

Musical parody resembles modern audio collage techniques inasmuch as both rely on pre-existing work to fulfill their satiric and communicative function. Musical parody dates back to the 15th century "parody mass"[91] and can be traced in the work of Mozart, Gilbert and Sullivan, Allan Sherman, Stan Freberg and Weird Al Yankovic[92]. Musical parody is typically directed at a specific target. From a legal standpoint "a permissible parody need not be directed solely to the copyrighted song, but may also reflect on life in general."[93] Nevertheless, "the copied work must be, at least in part, an object of the parody, otherwise there would be no need to conjure up the original work."[94]

Audio collage recordings may comment on, critique or poke fun at the appropriated text. However, collage recordings may also reflect upon the idiosyncracies of contemporary society, and in particular our sonic environment[95]. Like parody,

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77. *Elsmere Music, Inc. v. NBC Inc.*, 482 F. Supp. 741, 744 (S.D.N.Y. 1980), aff'd per curiam, 623 F.2d 252 (2d Cir. 1980).
78. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986).
79. *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275, 277 (2nd Cir. 1936).
80. *Elsmere*, 482 F. Supp. at 744.
81. *Dees*, 794 F.2d at 434.
82. *Id.* at 439.
83. M. Nimmer & D. Nimmer, *supra*, note 67, § 2.05[D] at 2 -58.
84. Pareles, *A Zillion -Dollar Question: Who Did What in a Song*, N.Y. Times, Apr. 28, 1988, Sec. C, at 21.
85. See Cooper, *Response Recordings as Creative Repetition: Answer Songs and Pop Parodies in Contemporary American Music*, One, Two, Three, Four, Winter 1987, at 79.
86. See *supra* note 6.
87. See Aaron Keyt, *Comment, An Improved Framework for Music Plagiarism Litigation*, 76 Calif. L. Rev. 421, 423 (1988) (arguing that traditional notions of music plagiarism inadequately address the fundamental nature of music and music composition).
88. Oswald, *supra*, note 16, at 104. Composer John Oswald observes that *"(j)azz musicians do not wiggle two fingers of each hand in the air, as lecturers sometimes do, when cross-referencing during their extemporizations, as on most instruments this would present some technical difficulties." Id.*
89. Since a composer may alter the speed, change the pitch or put a delay on any given sample, it is not always easy to determine which recording is being "sampled." Although computer analysis of the original composition and derivative collage is possible, the addition of other sounds can make it difficult or impossible to isolate the original work. Assuming that it is possible to detect copying, a substantial similarity analysis will focus upon the quantitative amount and qualitative importance of the material taken from another's work. M. Nimmer & D. Nimmer, *supra*, note 67, § 13.03[A][2] at 13 -42.1-13-43. Less similarity is required to prove infringement where proof of access is shown. *Sid and Marty Kroft Television Prods. Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977).
90. Derivative works are defined under the Copyright Act as *"a work based upon one or more preexisting works, such as a...musical arrangement, ...sound recording...or any other form in which a work may be recast, transformed or adapted."* 17 U.S.C. § 101 (1991). An audio collage is a derivative work, inasmuch as it is comprised of pre-existing public domain and/or copyrighted works coupled with original acts of authorship. *Id.*
91. The parody mass is a composition dating back to the 15th and 16th century, incorporating extensive borrowed material from various voice parts or entire sections of a polyphonic composition. *Harvard Dictionary Of Music* 643 (2d ed. 1969).
92. Gordon & Sanders, *Strangers in Parodies: Law of Musical Satire*, N.Y.L.J., Jan. 18, 1991, at 5.
93. *MCA, Inc. v. Wilson*, 677 F.2d at 185.;
94. Id.
95. The collage ensemble Negativland has traditionally focused its humorous commentary on American consumer society. According to Negativland, their work:
"occupies itself with recontextualizing captured fragments to create something entirely new. A psychological impact based on a new juxtaposition of diverse elements ripped from their usual context chewed up and spit out as a new form of hearing the world around us. One of Negativland's artistic obsessions involves the media itself as source and subject for much of our work. We respond, as artists always have, to our environment increasingly filled with artificial ideas, images and sounds. Television, billboards, newspapers, advertisements and music/muzak being blasted at us everywhere we go. And that background hum of everyday life certainly includes top 40 bands like U2." Negativland, Excerpt from *Over the Edge* KPFA Broadcast, Oct. 10, 1991. See *supra*, note 51 regarding litigation over Negativland's commercially released parody of the band U2.

sound collage manipulates cultural signifiers, shifting context and meaning in order to juxtapose contrasting realities. "[T]he humorous effect achieved when a familiar line is interposed in a totally incongruous setting, [is] traditionally a tool of parodists...."[96] However, sound collage artists may also practice a more subtle kind of juxtaposition. A collage recording may subvert traditional notions of western music by juxtaposing a variety of otherwise incongruous sounds and voices. Or a composer may manipulate familiar material into a unique composition virtually unrecognizable due to extensive electronic manipulation of the source material.

While audio collage recordings may not achieve a solely comic effect, they nevertheless communicate meaning in a manner similar to that of parody. Theorist Frederic Jameson underscores this difference by noting that:

"Pastiche is, like parody, the imitation of a peculiar or unique style, the wearing of a stylistic mask, speech in a dead language: but it is a neutral practice of such mimicry, without parody's ulterior motive, without the satirical impulse, without laughter, without that still latent feeling that there exists something normal compared to which what is being imitated is rather comic. Pastiche is blank parody, parody that has lost its sense of humor."[97]

As a reflection of what Jameson calls our "postmodern" condition, these audio collages mirror the forest of images and signs bombarding our everyday lives. Though lacking parody's satiric impulse, these works nevertheless capture and communicate a sense of the absurd, as they juxtapose and synthesize an assortment of media-derived texts which comprise and reflect upon contemporary American experience.

Parody, like collage, necessitates the copying or imitation of another pre-existing work, and a body of case law has developed concerning the extent to which a parody may permissibly recall a parodied text. Since the Ninth Circuit's initial decision in *Loew's Inc. v. Columbia Broadcasting System*[98], many works of parody have been recognized as a fair use of copyrighted material. Today, courts view parody as "deserving of substantial freedom-both as entertainment and as a form of social and literary criticism."[99] Authors of parodies are today entitled to a more extensive use of another's copyrighted work than authors who create other fictional or dramatic works[100]. Because audio collages also communicate meaning by manipulating the signifying elements of pre-existing works, it is appropriate at times to analyze audio collage recordings in light of the permissible limits typically accorded commercial works of parody. This analysis is here performed in light of the Supreme Court's forthcoming decision in *Campbell v. Acuff-Rose Music, Inc.*[101], which promises to significantly influence the law of parody and fair use, and in particular the law with regard to musical parody.

VII. FAIR USE

Fair Use is commonly defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner."[102] Fair use is one exception to the exclusive right of authors to control their work. The policy behind the fair use doctrine is that courts should "occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry."[103] Congress has acknowledged that pre-existing content used in a work of parody may fall within the scope of a fair use analysis[104]. However, because Congress failed to classify parody as a presumptive fair use, each assertion of the parody defense must be considered individually, taking into account various "statutory factors, reason, experience, and, of course, general principles developed in past cases."[105]

The common law fair use doctrine was codified by Congress in the 1976 Copyright Act at Section 107. This section requires that at least four factors be taken into account within any fair use analysis: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes[106]; (2) the nature of the copyrighted work[107]; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole[108]; and (4) the effect of the use upon the potential market for or value of the copyrighted work[109]. In addition to the above four factors, courts may also look at additional factors in determining whether a particular infringing use constitutes a fair use of copyright material[110]. The 1976 Copyright Act "endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change."[111] Nevertheless, judicial analysis is typically restricted to the four factors enumerated within § 107.

A. Purpose and Character of Use

Any fair use analysis initially focuses upon the purpose and character of defendant's use, including whether the use is commercial or for nonprofit educational purposes[112]. However, whuile fair use encompasses criticism, comment, news reporting and photocopying for teaching purposes[113], many of these activities are generally conducted for profit in this country[114]. Parody in particular is an act of criticism and social commentary that frequently exists within a commercial context, especially as it functions within the commercial boundaries of popular culture where distinctions between art and commodity have become increasingly blurred.

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96. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d. Cir.), cert. denied, 379 U.S. 822 (1964).
97. Jameson, *Postmodernism and Consumer Society, The Anti-Aesthetic: Essays on Postmodern Culture* 114 (1983).
98. 131 F. Supp. 165 (S.D. Cal. 1955).
99. *Berlin*, 329 F.2d at 545.
100. *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 745 (S.D.N.Y. 1980).
101. 972 F.2d 1429 (6th Cir. 1992), *reh'g, en banc, denied*, 1992 U.S. App. LEXIS 28925 (6th Cir. 1992), *and mot. granted, cert. granted, in part*, 61 U.S.L.W. 3667 (U.S. Mar. 30, 1993) (No. 92-1292). Since the completion of this article, tha Supreme Court decided the matter of *Campbell v. Acuff-Rose Music*, 1994 WL 64738 (U.S. Mar. 7, 1994). The Supreme Court held that 2 Live Crew's take-off of the Roy Orbison song "Oh, Pretty Woman" may be a protected parody under a fair use analysis.
102. *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2nd Cir. 1966) (quoting Ball, *Copyright and Literary Property*, 260 (1944)).
103. *Berlin*, 329 F.2d at 544.
104. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 65. According to the House Report: *"The examples enumerated . . . while by no means exhaustive, give some idea to the sort of activities the courts might regard as a fair use under the circumstances: "quotations of excerpts in a review or criticism for purposes of illustration or comment; quotations of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied . . . ." Id.*
105. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986).
106. 17 U.S.C. § 107(1) (1991).
107. *Id.* § 107(2).
108. *Id.* § 107(3).
109. *Id.* § 107(4).
110. Section 107 of the Copyright Act states that a fair use analysis "shall include" the above four criteria; According to § 101 of the 1976 Act the term "including" is defined as "illustrative and not limitative." *Id.* § 101.
111. *House Report, supra*, note 75, at 66.
112. 17 U.S.C. § 107(1) (1991).
113. *Id.* at § 107.
114. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting).

In *Sony Corp. of America v. Universal City Studios, Inc.*[115], the Supreme Court affirmed that every commercial use of copyrighted material is presumptively an unfair exploitation of the monopoly privilege belonging to the copyright owner[116]. The Court held that Sony's sale of Betamax videotape recorders did not "contributorily infringe" defendant's programs broadcast over network television. In finding home taping protected under a fair use analysis, the Court observed that videotape recorders are used primarily by consumers for "time-shifting" network programming for more convenient home viewing. The court noted that "time-shifting" constitutes a non-profit, rather than commercial, use of the recorded programs inasmuch as these recordings are typically erased, rather than sold, after later viewing.

Although the commercial context of a work is important, it is not by itself wholly determinative. In enacting the 1976 Copyright Act, Congress noted that the fair use criteria codified in § 107 were

"not intended to be interpreted as any sort of a not-for-profit limitation on educational uses of copyrighted works. It is an express recognition that, as under the present laws, the commercial and non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."[117]

In fact, some courts have found a fair use of copyright material even where the purpose and character of defendant's use was commercial in nature. The Fifth Circuit in *Triangle Publications, Inc. v. Knight -Ridder Newspapers, Inc.*[118] reversed a district court finding that commercial motive was conclusive on the issue of fair use[119]. In *Triangle Publications, Inc.*, the court ruled that defendant's use of a *TV Guide* magazine cover in a comparative advertisement for defendant's own TV supplement was not an infringing use under applicable fair use guidelines[120]. Here, the court found that the commercial nature of plaintiff's *TV Guide* publication neither supported nor hurt defendant's claim that a fair use defense was appropriate[121]. The court asserted that defendant's use was not substantial since only the cover of *TV Guide* was reproduced and not "the essence of *TV Guide* - the television schedules and articles."[122] In addition, the court observed that the effect on *TV Guide*'s market was at most *de minimis*, with no deleterious or value reducing effect on plaintiff's copyrighted magazine cover[123].

With respect to parody, the district court in *Tin Pan Apple, Inc. v. Miller Brewing Co.*[124] observed that appropriation of copyrighted material "solely for personal profit," and *without any creative purpose*, cannot constitute parody as a matter of law[125]. In *Tin Pan Apple*, a popular rap group ("The Fat Boys") sued defendant brewing company for using look-alikes and sound-alikes in a beer commercial previously rejected by the band. The court in *Tin Pan Apple* took issue with defendant's assertion that their commercial operated as parody, concluding that a work must be a *valid* parody in order to qualify for fair use protection[126]. Here, defendant's beer commercial was found not to constitute a valid parody inasmuch as the commercial was used entirely for profit by promoting the sale of beer[127].

However, in *Eveready Battery Co. v. Adolph Coors Co.*[128], the district court ruled that defendant's television commercial parodying plaintiff's "Energizer Bunny" campaign would likely be found non-infringing under a fair use analysis[129]. In rejecting plaintiff's motion for preliminary injunction, the court observed that although the commercial purpose and character of defendant's use weighed in favor of plaintiff, none of the remaining three factors favored plaintiff[130].

The court in *Eveready Battery Co.* disagreed with *Tin Pan Apple* that appropriation of copyrighted material "solely for personal profit," and without any creative purpose, cannot constitute parody as a matter of law[131]. The court in *Eveready Battery Co.* noted that the phrase "solely for personal profit"' contradicted the language of § 107[132]. In rejecting *Tin Pan Apple*'s exclusive focus on the commercial context of defendant's work, the court observed that *"[a]lthough the primary purpose of most television commercials . . . may be to increase product sales and thereby increase income, it is not readily apparent that they are therefore devoid of any artistic merit or entertainment value. Notably, not all viewers who laugh at a commercial will buy the advertised product."*[133] As a result, the court in *Eveready Battery Co.* recognized that almost all works of parody necessarily operate within the commercial confines of our culture.

The Supreme Court appears ready to address the issue of commercially available parodies, having granted certiorari in the case of *Campbell v. Acuff Rose Music, Inc*[134]. In *Campbell*, the Sixth Circuit reversed a lower court finding that defendant 2 Live Crew's parody of the Roy Orbison song *Oh, Pretty Woman* constitutes a fair use of plaintiff's popular hit recording[135]. In rejecting the district court's findings, the Sixth Circuit noted that "(i)t is the blatantly commercial purpose of the derivative work that prevents this parody from being a fair use."[136] Although the majority reiterated that commercial purpose is not controlling on the issue of fair use, the court observed that 2 Live Crew's parody was included on a commercially distributed album sold for the purpose of making a profit, requiring a presumption that the use was unfair[137].

In a strong dissent, one Sixth Circuit justice distinguished the creative act of caricaturization from mere copying for commercial purposes[138]. "By calling into being a new and transformed work, the caricaturist exercises a type of creativity that is foreign to the work of the copyist. And the creative work of the caricaturist is surely more valuable than the reproductive work of the copyist."[139] The dissent cited the comic operas of Gilbert and Sullivan, reasoning that the "world would . . .

115. 464 U.S. 417 (1984).
116. *Id.* at 451. (also cited in *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 562 (1985)).
117. *House Report, supra*, note 75, at 66.
118. 626 F.2d 1171 (5th Cir. 1980)
119. *Id.* at 1178.
120. *Id.* at 1177 -78.
121. *Id.* at 1178.
122. *Id.* at 1177.
123. Id.
124. 737 F. Supp. 826 (S.D.N.Y. 1990).
125. *Id.* at 831 (emphasis added).
126. *Id.* at 830.
127. *Id.* at 832. See also *Rogers v. Koons*, 960 F.2d 301, 310, (2nd Cir. 1992) (*"Koons' copying of the photograph 'Puppies' was done in bad faith, primarily for profit-making motives, and did not constitute a parody of the original work."*)
128. 765 F. Supp. 440 (N.D. Ill. 1991).
129. *Id.* at 446 -48.
130. *Id.* at 447.
131. *Tin Pan Apple*, 737 F. Supp. at 831.
132. *Eveready Battery Co.*, 765 F.Supp. at 446.
133. *Id.* at 446 -47. In addition to finding that the commercial context of defendant's commercial was not dispositive, the court in *Eveready Battery Co.* observed that there was no indication defendant's commercial would supplant plaintiff's. *Id.* at 448. Although both commercials shared the same audience and television medium, the court observed that viewers would not stop watching plaintiff's commercial in order to watch defendant's commercial on another channel. *Id.*
134. 972 F.2d 1429 (6th Cir. 1992), *reh'g, en banc, denied*, 1992 U.S. App. LEXIS 28925 (6th Cir. 1992), *and mot. granted, cert. granted, in part*, 61 U.S.L.W. 3667 (U.S. Mar. 30, 1993) (No. 92-1292).
135. *Campbell*, 972 F.2d at 1439 (subsequent history omitted).
136. Id.
137. *Id.* at 1436-37.
138. *Campbell*, 972 F.2d at 1443 (Nelson, J., dissenting).
139. *Id.*

be a poorer place if Lord Tennyson could have stilled the voice of W.S. Gilbert merely because Gilbert's purposes included the making of money[.]"[140]. Accordingly, the dissent believed that the act of parody for profit is not presumptively "unfair."[141]

The Supreme Court granted certiorari in March 1993 in order to resolve the fair use issue in *Campbell*. Of significance will be whether the Court reiterates the *Betamax* holding that use of a copyrighted work primarily for commercial purposes is presumptively unfair[142], or whether the Court decides that "the presumption of unfairness in cases of commercial exploitation 'is sensible and appropriate only when applied to commercial reproductive uses...' "[143] Although the Supreme Court previously showed some hostility towards the fair use doctrine in *Harper & Row Publishers, Inc. v. Nation Enterprises*[144], it remains possible that the Court's intent in reviewing the Sixth Circuit decision in *Campbell* is to reaffirm the role of copyright law in "stimulat[ing] artistic creativity for the general public good."[145]

B. Nature of the Copyrighted Work

The second focus of any fair use analysis involves the nature of the copyrighted work. Here a court may consider "among other things whether the work was creative, imaginative and original . . . and whether it represented a substantial investment of time and labor made in anticipation of a financial return."[146] A work's unpublished status is a critical element of its nature[147]. Use of unpublished material will not in itself preclude an artist from asserting a fair use defense. However, if an audiocollage artist appropriates sounds from an unauthorized "bootleg" recording or other unreleased work, the unpublished nature of that work will be a significant factor weighing against any finding of fair use.

Another relevant factor here is whether the work being infringed is of a factual or fictitious nature. Factually based works are typically granted more permissive use. However, in *Harper & Row Publishers, Inc. v. Nation Enterprises*[148], the Supreme Court ruled that a *Nation* magazine article that excerpted memoirs of President Ford in discussing the Nixon pardon did not constitute a fair use of President Ford's memoirs, despite factual and newsworthy nature of this material[149]. The Court distinguished between factual elements within President Ford's memoirs which fell within the public domain, and President Ford's particular "expression" of these facts, which defendant reproduced[150]. As a result, the Harper & Row decision suggests that a more permissive use may be allowed of factual works, as long as these works contain little subjective expression.

The Court's decision in *Harper & Row* means that audio collage artists incorporating excerpts of broadcast news material into their work may lack a strong fair use defense, despite the factual nature of this material. Copyright owners of broadcast news programming may argue that this information is the copyrightable "expression" of the announcer, hired precisely because of a unique delivery, style, or vocal mannerisms[151]. Any First Amendment defense to such use may potentially fail inasmuch as First Amendment concerns are not traditionally considered within a fair use analysis, and courts are extremely reluctant to merge the two[152].

C. Amount and Substantiality of the Portion Used

The third fair use factor, the amount and substantiality of the portion used, is significantly intertwined with questions of substantial similarity[153]. In both, an examination is made into the qualitative and quantitative aspects of substantiality[154].

Because parody and satire deserve substantial freedom as a form of social criticism and entertainment[155], courts are more willing to allow a substantial use of copyrighted material in works which parody that material. However, in *Walt Disney Prods. v. Air Pirates*[156], the Ninth Circuit noted that a balance must be struck between the desire to make the "best parody" and the need to protect the copyright owner by allowing only as much use as necessary to "conjure up" the original[157]. Using this test, the court in Air Pirates found defendant "conjured up" more than was necessary when defendant's underground comic book "placed several well-known Disney cartoon characters in incongruous settings where they engaged in activities clearly antithetical to the accepted Mickey Mouse world of scrubbed faces, bright smiles and happy endings."[158] Here, the court emphasized the widespread recognizability of Disney's characters required little substantive copying to place these characters in the minds of readers[159].

One problem with the "conjure up" theory with regard to musical parody, however, is the brevity of most popular songs. In 1986, the Ninth Circuit addressed the issue of how much copying is permissible in works of musical parody. In *Fisher v. Dees*[160], plaintiffs alleged that a 29 second parody entitled *When Sunny Sniffs Glue* improperly infringed upon their popular recording from the 1950s (*When Sunny Gets Blue*). The court in *Dees* rejected defendant's assertion that this was a *de minimis* taking, noting that a parody is only successful if the work incorporates enough to make a connection between the original and the comic version and evoke recognition[161].

In *Dees*, the court upheld a finding of fair use as a matter of law, despite defendant's substantive taking. The court rejected the argument that defendant could only incorporate as much as necessary of a copyrighted work to conjure it up, and no more[162]. The Ninth Circuit acknowledged that a song is difficult to parody effectively without exact or near exact copying, since any variation in the music or meter would render the composition unrecognizable[163]. The court also recognized this

140. *Id.*
141. *Id.* at 1443 -44.
142. *Sony Corp.*, 464 U.S. 417, 449 (1984).
143. *Campbell*, 972 F.2d at 1443 (Nelson, J., dissenting) (citing Note, *The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L.Rev. 1395, 1408 (1984)). In fact, the court ruled that a for-profit commercial parody may constitute a fair use under some circumstances.
144. See *infra*, notes 148 - 150 and accompanying text.
145. *Id.* (citing *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975)).
146. *MCA, Inc. v. Wilson*, 677 F.2d 180, 182 (2d Cir. 1981).
147. *Harper & Row Publishers, Inc. v. Nation Enter.*, 471 U.S. 539, 564 (1992).
148. 471 U.S. 539 (1985).
149. *Id.* at 569.
150. *Id.* at 563 -64.
151. See *Columbia Broadcasting Systems, Inc. v. Documentaries Unlimited, Inc.* 42 Misc. 2d 723 (1964) (defendants infringed CBS's common - law copyright by reproducing one minute of reporter Allan Jackson's "off -the-air" news announcement concerning the assassination of President Kennedy in commercially released LP *JFK, the Man, the President*).
152. This reluctance is evident in *Triangle Publications, Inc. v. Knight -Ridder Newspapers*, Inc., 626 F.2d 1171 (5th Cir. 1980) (invalidating a district court finding that a copyright infringement suit could be defeated by a first amendment defense).
153. M. Nimmer & D. Nimmer, *supra*, note 38, § 13.05[A] at 13-88.10.
154. *Id.*
155. *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 (2d. Cir.), *cert. denied*, 379 U.S. 822 (1964).
156. 581 F.2d 751 (9th Cir. 1978).
157. *Id.* at 758.
158. *Id.* at 753.
159. *Id.* at 757 -58.
160. 794 F.2d 432 (9th Cir. 1986).
161. *Id.* at 435 n.2.
162. *Id.* at 438.

special need for accuracy provides some license for "closer" parody[164]. Accordingly, *Dees* stands for the proposition that works of musical parody may be entitled to substantially more copying than is commonly accorded parodies within other media given a traditional fair use analysis.

Another signification decision with respect to musical parody is the case of *Elsmere Music Inc. v. National Broadcasting Co*[165]. In *Elsmere Music Inc.*, the Second Circuit observed that the concept of "conjuring up" an original is based on the recognition that a parody frequently requires more than a "fleeting evocation" of an original in order to make its point[166]. The Second Circuit here reaffirmed a ruling of summary judgment for defendants, who parodied plaintiff's advertising jingle on the popular television program "Saturday Night Live."[167] In upholding a finding of fair use, The Second Circuit noted that, "(a) parody is entitled at least to "conjure up" the original. Even more extensive use would still be fair use, provided the parody builds upon the original, using the original as a known element of modern culture and contributing something new for humorous effect or commentary."[168]

It appears that the pending Supreme Court case *Campbell v. Acuff Rose Music, Inc.*[169], may further define how much preexisting material can be incorporated into works of musical parody. In *Campbell*, the Tennessee district court ruled that 2 Live Crew's version of the Roy Orbison tune "Oh, Pretty Woman" was a valid parody, and thus protected under the fair use provisions of Section 107[170]. Although the 2 Live Crew version contained many notable aspects of the Orbison song, the lower court observed that this was not a case of virtually complete or verbatim copying[171]. The court concluded that "[i]n view of the fact that the medium is a song, its purpose is parody, and the relative brevity of the copying, it appropriates no more from the original than is necessary to accomplish reasonably its parodic purpose."[172]

However, the Sixth Circuit reversed the lower court's finding of fair use. The appellate court noted that defendant's copying was qualitatively substantial inasmuch as the song closely tracked the music and meter of the original recording[173]. Defendants, along with one dissenting justice, argued this similarity was necessary to parody the original[174]. However, the Sixth Circuit expressed considerable reservations as to whether defendant's work in fact constituted a valid parody[175], and only grudgingly accepted the lower court's finding that this song was a valid parody[176]. Nevertheless, the court reiterated that near verbatim taking of the music and meter of a copyrighted work *without the creation of a parody* is excessive taking[177]. The appellate court then concluded that "taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original."[178]

The Sixth Circuit's debate as to the amount and substantiality a parody may "conjure up" reflects a larger and more fundamental disagreement concerning the nature and function of musical parody. Although "(p)arody by its very nature demands close imitation,"[179] courts are often reluctant to allow close copying of the original where a parody does not directly comment on the original[180]. Nevertheless, because the 2 Live Crew recording at issue in *Campbell* was found by the district court to directly parody the original Orbison tune[181], the Supreme Court's pending decision may not significantly expand the present scope of permissible parody even if the Court chooses to reverse the Sixth Circuit's decision. However, if the Supreme Court fails to uphold a finding of fair use in this instance, the permissible scope of valid parodies will remain very narrow indeed.

D. Effect on Plaintiff's Market

The fourth factor of any fair use inquiry concerns the impact of defendant's use on the value of or potential market for plaintiff's work[182]. The Supreme Court in

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163. *Id.* at 439.
164. *Id.*
165. 482 F. Supp. 741 (S.D.N.Y. 1980), *aff'd per curiam*, 623 F.2d 252 (2d Cir. 1980).
166. *Elsmere*, 623 F.2d at 253 n.1.
167. In *Elsmere Music Inc.*, defendant's song *I Love Sodom* was meant to symbolize the use of a catchy and upbeat tune (plaintiff's *I Love New York*) to divert a potential tourist's attention from the town's reputation for "gambling, gluttony, idol worshipping and, of course, sodomy." *Elsmere Music Inc.*, 482 F. Supp. at 746. Here, defendants altered the song's symbolic identification with the "glamorous" side of New York City, while simultaneously using this parody to humorously comment on the cynical uses of media advertising. In fact, defendant's parody resembled the Situationist practice of Detournement, whereby "'any sign'– any street, advertisement, painting, text, any representation of a society's idea of happiness– 'is susceptible to conversion into something else, even its opposite.'" G. Marcus, *Lipstick Traces* 179 (1989) (citing G. Debord and G.J. Wolman, principle actors within the French Situationist group.)
168. *Id.*
169. 972 F.2d 1429 (6th Cir. 1992), *reh'g, en banc, denied*, 1992 U.S. App. LEXIS 28925 (6th Cir. 1992), *and mot. granted, cert. granted, in part*, 61 U.S.L.W. 3667 (U.S. Mar. 30, 1993) (No. 92-1292). See *supra*, notes 105-115, and accompanying text.
170. *Acuff Rose Music Inc. v. Campbell*, 754 F.Supp. 1150, 1159 (D.C. Tenn. 1991), *rev'd*, 972 F.2d 1429 (6th Cir. 1992).
171. *Id.* at 1157.
172. *Id.*
173. *Id.* at 1438. Plaintiff's musicologist believed this identifiable component was probably sampled from the original. *Id.* The dissent suggested that this "one measure guitar lick" was *de minimis*, and in any event, was not shown by a preponderance of the evidence. *Id.* at 1444, n. 5 (Nelson, J., dissenting).
174. *Campbell*, 972 F.2d at 1445 (Nelson, J., dissenting).
175. *Campbell*, 972 F.2d at 1435 -36, n. 8. The Sixth Circuit court had trouble discerning any parody of the original song "even accepting that 'Pretty Woman' is a comment on the banality of white-centered popular music." *Campbell*, 972 F.2d at 1436, n. 8. The court noted that "(t)he mere fact that both songs have a woman as their central theme is too tenuous a connection to be viewed as critical comment on the original." *Id.* In dicta, the court reiterated that without direct comment on the original, there can be no parody. *Id.* (citations omitted).
On this issue, the dissent argued that "[u]nder anyone's definition, it seems...the 2 Live Crew song is a quintessential parody... " *Id.* at 1441. According to the dissent: *"[T]he parody (done in an African -American dialect) was clearly intended to ridicule the white - bread original... [2 Live Crew's narrative] is much more explicit, and it reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not without its consequences. ... This, I should say, is 'criticism' with a vengeance - and the thematic relationship to the original is obvious." Id.* at 1442.
176. *Id.* at 1435.
177. *Id.* (citing *MCA, Inc.*, 677 F.2d at 183 -85) (emphasis added).
178. *Id.* at 1438.
179. Bisceglia, *Parody and Copyright Protection*, 34 *ASCAP Copyright Law Symposium* 1, 17 (1984).
180. *Rogers v. Koons*, 960 F.2d 301, 310 (2nd Cir. 1992) (citing *MCA, Inc.*, 677 F.2d at 185). However, musical parody often extends beyond mere commentary upon the original composition:
"[S]ong parodies have been a staple of American political life since the nation's beginnings and have been used by union organizers, war resisters, war supporters, abolitionists, suffragettes, Whigs, Democrats, Republicans, and many others to express their views on the politics of the day. Yankee Doodle, *the* Star-Spangled Banner, *and* The Battle Hymn of the Republic *all began as song parodies– a placing of new and controversial words to a then popular song." Fair Use or Unfair Abuse*, Legal Times, Apr. 5, 1993, at 46 (citing amici brief of The Capital Steps and Mark Russell in *Campbell v. Acuff Rose Music, Inc.*, 972 F.2d 1429 (6th Cir. 1992), *cert. granted, Slip Op.* (U.S. 1993).
181. See *supra*, notes 134 -137, and accompanying text.
182. 17 U.S.C. § 107(4) (1991).

Harper & Row observed that this last factor is the single most important element of any fair use analysis[183]. However, protecting an author's financial incentive to create does not require the prohibition of works that have no demonstrable effect on the potential market for, or value of, a copyrighted work[184].

Although interference with plaintiff's potential market typically prevents a defense of fair use, any *criticism* of the original that reduces the value of that work will not result in a finding of infringement[185]. The critical function of parody "may quite legitimately aim at garroting the original, destroying it commercially as well as artistically."[186] Therefore, courts are concerned only with those parodies that satisfy the demand for the original work, rather than the suppression of demand which may result from effective parody[187].

Two Second Circuit decisions help define the parameters of permissible parody here. In *MCA, Inc. v. Wilson*[188], the Second Circuit affirmed a District Court finding that defendant's song *Cunnilingus Champion of Company C* did not constitute a fair use of plaintiff's tune *Boogie Woogie Bugle Boy of Company B*. The Second Circuit observed that the two songs were competing works because both tunes were available on phonograph record and the sale of these records was a traditional means of exploiting musical works[189]. However, the decision in *MCA, Inc. v. Wilson* has been criticized for finding infringement without a closer examination into the challenged work's effect on economic incentives and for failing to show economic harm to plaintiff[190]. While the original and parody compositions in *MCA, Inc. v. Wilson* were both performed on stage and sold as recordings, the court here ignored the possibility that the theatre and music industries attract a variety of non-competing audiences. In particular, defendant's production, entitled *Let My People Come*, was described by columnists and the court as an "erotic nude show" with "sexual content raunchy enough to satisfy the most jaded porno palate."[191] While further testimony may have revealed whether defendant's use caused harm to plaintiff's work or to their market, it is certainly reasonable to presume that the market for defendant's pornographic parody differed from the market for plaintiff's Top 40 composition. Similarly, in *Walt Disney Prods. v. Air Pirates*[192], the court offered no evidence that defendant's comic book affected the value of Disney's work in any way or had any impact on Disney's market. Indeed, it is unlikely that the audience for Disney's products would overlap with the audience for defendant's underground comic, particularly since the sale of defendant's underground comic was likely restricted to adult consumers over the age of 18.[193]

1. Marketplace impact of audio collage recordings

Today, the widespread commercial success of rap and hip-hop recordings reflects the popularity of modern audio collage techniques. However, other composers create sound collages that are seldom heard on commercial radio or carried in mainstream record stores. These latter recordings often have little or no effect on sales of the original works due to differences in theme, content and style. Many experimental collage recordings are typically released in limited quantities and are frequently unavailable in neighborhood retail outlets. These recordings are commonly sought by new music fans or adventurous consumers who learn of these recordings by word of mouth. Assuming these recordings are available in record stores, they will typically be filed under categories such as "new," "independent," or dance music. Absent any misleading cover art, a consumer may be unlikely to confuse a derivative collage recording with the source material comprising that composition. Even commercially successful rap, dance and hip-hop recordings may have little impact on marketplace demand for the original compositions where studio production techniques significantly alter the underlying source material.

In *Acuff Rose Music, Inc. v. Campbell*[194], the Tennessee district court tangentially addressed the issue of whether musical collage works infringe upon the market of pre-existing recordings. Here the court compared and contrasted the theme, style and content between plaintiff's "classic" rock recording, Roy Orbison's *Oh, Pretty Woman*, and the 2 Live Crew rap parody of the same name[195]. Both songs were found to share virtually the same title, key lyrics, guitar refrain, introductory drum pattern, melody and chorus[196]. After focusing on distinctive stylistic differences, the district court determined that the potential market for "Oh, Pretty Woman" was not affected by defendant's satiric version, since the "intended audience for the two songs is entirely different."[197]

Since the early 1980s, critics of digital sampling have argued that sampling artists use public recognition of earlier recordings to sell records without compensating the original artists. However, proponents of digital sampling argue that these new collage compositions pay homage to the original artist and rejuvenate sales of their recordings[198]. As an example, some critics maintain that widespread sampling of rhythm and blues pioneer James Brown helped rejuvenate his career[199]. Despite

183. *Harper & Row*, 471 U.S. at 566.
184. *Sony Corp.*, 464 U.S. at 450.
185. *Loew's Inc. v. Columbia Broadcasting System*, 131 F. Supp. 165, 184 (S.D. Cal. 1955).
186. *Dees*, 794 F.2d at 437, (quoting B. Kaplan, *An Unhurried View of Copyright* 69 (1967)).
187. *Dees*, 794 F.2d at 438. In *Leo Feist, Inc. v. Song Parodies, Inc.*, 146 F.2d 400 (2d Cir. 1944) the trial court found that defendant's song-lyric magazines contained parodies which met "the same demand on the same market...thereby impairing the value and prejudicing the sale of said songs." *Id.* at 401 (citing *Record on Appeal*). However, in *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964), defendant *Mad* Magazine's parody of plaintiff's lyrics was found to constitute a fair use of that material. *Berlin* at 545. Although the *Berlin* court did not directly touch upon the economic impact of these parodies, the court's finding seemingly acknowledged that little impact would result inasmuch as "(t)he disparity in theme, content and style between the original lyrics and the alleged infringements could hardly be greater." *Id.*
188. 677 F.2d 180 (2d Cir. 1981).
189. *Id.* at 183.
190. See *Note, The Parody Defense to Copyright Infringement: Productive Fair Use After Betamax*, 97 Harv. L. Rev. 1395, 1405 (1984).
191. *MCA, Inc.*, 677 F.2d at 181.
192. See *supra*, notes 156-159, and accompanying text.
193. These two cases suggest that parodies in "poor taste" are less likely to acquire fair use protection. "Vulgarity, in practice, probably cuts against acceptance of the parody defense." *Campbell*, 972 F. 2d 1446, n. 9 (Nelson, J., dissenting). [*Ed. Note:* This view was later repudiated by the Supreme Court in their decision in *Campbell v. Acuff-Rose, Inc.*]
194. See *supra*, notes 134 - 141, and accompanying text.
195. *Campbell*, 754 F. Supp. at 1156 (subsequent history omitted).
196. *Id.*
197. *Id.* at 1158. "'(T)he song *Oh, Pretty Woman*... was intended for Mr. Orbison's country music audience and middle-America. On the other hand, 2 Live Crew's version...is aimed at the large black populace which used to buy what was once called 'race' records.'" *Campbell*, 972 F.2d at 1445 (Nelson, J., dissenting) (citing affidavit of Oscar Brand).
198. Gordon & Sanders, *The Rap on Sampling: Theft or Innovation*, N.Y.L.J., Apr. 28, 1989, at 5-6.
199. Christgau, *Ulysses No. 1, Village Voice Rock & Roll Quarterly*, July 1991, at 26. James Brown has reportedly been sampled on as many as 3,000 hip-hop tracks since the early to mid-1980s. Santoro, *James Brown*, Nation, Jun. 3, 1991, at 749.

(or because of) the heavy sampling of his work, Brown's recordings have continued to sell in significant numbers. Many rap artists would argue that James Brown's renewed popularity and enhanced critical reputation is in part due to his influence on a new generation of listeners familiar with his work only through the collage compositions of others[200].

Because public familiarity with the stylistic conventions of audio collage has grown, consumers may be unlikely to confuse a collage piece with an underlying recording "sampled" within it, unless that sample is substantive enough to constitute a significant portion of the derivative work[201]. While both recordings may be available on the same radio stations and in the same stores, this should not constitute conclusive proof that a musical collage will have an adverse market impact on the original. In fact, a musical collage that quotes an out-of-print record may generate renewed interest in that song, providing incentive for copyright owners to reissue that recording. While original copyright holders should be compensated if substantial similarity exists, a recording using *de minimis* samples of an earlier work will not automatically fulfill the market demand for that work. In fact, a synergistic effect may occur, whereby a demand for both recordings is created[202].

2. Fair use and the "functional test"

Another method of evaluating the market impact of a collage recording involves what Professor Nimmer calls the "functional" test. Here, comparison is made of the function of each work regardless of the medium in which it appears[203]. A fair use defense may be permitted if defendant's work is similar to, but performs a different function than, plaintiff's work[204]. The disparity of function between a serious work and a satire based upon it may sometimes justify the defense of fair use despite substantial similarity[205]. Professor Nimmer also noted there may be instances where virtually complete copying of a work for a different function or purpose will constitute a fair use[206].

One example of the functional test involves a news photo of the My Lai massacre. Professor Nimmer believed this photograph should be exempted from full copyright protection because its reproduction promotes democratic dialogue about significant current events, whereas a sketch or mere description lacks the photo's visceral impact[207]. Nimmer specifically excludes from this test other graphic works such as paintings and sculptures, and presumably musical compositions, because the public interest in these works is due to the creative contribution of the artist, not the factual content conveyed[208].

Application of Nimmer's functional test to collage recordings produces mixed results. Collage composers such as John Oswald, Christian Marclay and James Tenney create works of original artistic expression by reassembling elements from singular compositions. Audio collage artists seldom reproduce an entire recording verbatim[209]. While collage recordings may not serve the public interest to the same extent as a widely disseminated photo of the My Lai massacre, these compositions typically transform the underlying source material, and may sometimes implicate significant First Amendment interests. Not all audio collages promote vital political discussion, but many of these works do invoke overt political themes ranging from the incompetence of our political leaders to the increasing commodification of political discourse. To that extent, collage recordings using materials from broadcast television and radio should be granted some First Amendment protection if these works critically address significant social and political concerns[210].

VIII. COMPULSORY LICENSING AND SOUND RECORDINGS

The Supreme Court has noted that the essence of the commercial/non-profit distinction is "not whether the sole motive of the use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price."[211] Although sampling licenses are common within the recording industry, there presently exists no formulaic fee structure for the *de minimis* use of compositions or sound recordings in derivative audio collage compositions. Copyright owners are sometimes willing to negotiate a reduced mechanical royalty rate for medley recordings, but these negotiations may be conducted on a most favored nations basis (e.g. that no other copyright owner receive a more favorable rate in connection with the same medley)[212]. While it is advisable for collage composers to negotiate individual licenses, it is not always possible to obtain reduced fee licenses from all copyright owners quoted in a given work. The costs of negotiating reduced mechanical fees with numerous copyright owners escalates the cost of issuing collage recordings, thereby inhibiting the ability of musicians on small independent labels to release artistically challenging work.

Some composers have observed that older artists ask ridiculous prices for use of their compositions, perhaps out of greed, unfamiliarity with the practice of audio collage, or fear that their work will be parodied[213]. In addition, where "found" broadcast material is utilized, copyright owners may not be located at all. Because many collage artists attempt to secure permission only after a composition is satisfactorily completed, copyright

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200. See *Time, Inc. v. Bernard Geis Assoc.*, 293 F. Supp 130, 146 (S.D.N.Y. 1968) (defendant's book on the Kennedy assassination, incorporating sketches based on plaintiff's "Zapruder films," would likely not reduce the value of plaintiff's film, but might enhance the value of the underlying copyrighted work).

201. However, collage artists who reproduce substantial portions of copyrighted works arguably usurp the right of copyright owners to license these samples. D. Goldberg & R.J. Bernstein, *Reflections on Sampling*, N.Y.L.J., Jan. 15, 1993, at 3.

202. One music industry publisher has commented that medley recordings act as a positive force on the marketplace: "They act as good demos. There's not enough on a medley to stop anyone from recording the whole song again. It's found money." Christgau, *supra*, note 44, at 40. (quoting Jay Lowy of Motown's Jobete Music).

203. M. Nimmer & D. Nimmer, *supra*, note 38 § 13.05[B] at 13-88.17.

204. *Id.* at 13 -88.19.

205. One justice advocated taking into consideration the "social value of the parody as criticism" when making a fair use determination. *Campbell*, 972 F.2d at 1446 (Nelson, J., dissenting).

206. M. Nimmer & D. Nimmer, *supra*, note 38, § 13.05[B] at 13-90.14.

207. *Id.* § 1.10[C] at 1 -84.

208. *Id.* But see Patricia Krieg, *Note, Copyright, Free Speech, and the Visual Arts*, 93 Yale L.J. 1565 (1984) (arguing that courts should extend first amendment protection to visual works of art incorporating copyrighted news photographs, where those works further the goals of political discussion).

209. One exception is *United States v. Taxe*, 380 F.Supp. 1010 (C.D. Cal. 1974), *aff'd, vacated, and remanded in part*, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977). Defendants in *Taxe* altered popular recordings by changing the speed and frequency, and adding reverb, echo and moog synthesizer to these recordings in order to circumvent tape piracy laws. *Taxe*, 540 F.2d at 964. Because the lower court's jury instructions permitted the jury to consider the issue of substantial similarity, the Ninth Circuit upheld the criminal conviction of defendants under the 1971 Sound Recording Amendment. *Id.* at 964 -65.

210. But see *supra*, note 152, and accompanying text regarding the reluctance of courts to consider First Amendment issues when a fair use defense is raised.

211. *Harper & Row*, 471 U.S. at 562.

212. Gordon & Sanders, *Copyright Law Applications in Musical Parody Instances*, N.Y.L.J., Feb. 1, 1991, Sec. 1, at 7.

213. Aaron, *supra*, note 51, at 22.

owners often retain a disproportionate advantage in negotiating licensing fees, even though their work constitutes a small (but perhaps integral) segment of a given collage piece. As a result, artists frequently follow their own personal code of ethics when deciding whether to seek licenses for the use of underlying sound recordings. The lack of sampling guidelines promotes over-extensive borrowing in some instances, while encouraging artistic self-censorship in others.

One solution for dealing with copyright issues raised by digital sampling and other musical collage techniques is to institute some form of compulsory licensing for the fragmentary use of compositions and sound recordings. "The provision for compulsory licensing of copyrighted musical compositions promotes the arts by permitting numerous artistic interpretations of a single written composition.[214]" A compulsory licensing system allowing for the limited use of sound recordings in derivative collage compositions would produce standardized results and prevent recording artists from relying on a self -imposed set of ethics. Other solutions have also been suggested[215], ranging from "needle -drop" schemes used by stock music libraries[216] to licensing schemes similar to the "shrink -wrap" license currently used for computer software[217]. Composer John Oswald suggests that artists voluntarily acknowledge their sources in a manner reminiscent of more traditional forms of scholarship[218] thereby giving credit to copyright owners and incentive to consumers to purchase these original recordings[219]. While some of these proposals are more speculative than others, each nevertheless constitutes some improvement over the current uncertainty that exists when attempting to obtain sampling licenses.

IX. CONCLUSION

Igor Stravinsky once observed that "(a) good composer does not imitate; he steals."[220] Although sound collage artists are often accused of theft, these artists more frequently use mere fragments of pre-existing works to construct entirely new musical pieces. While compositions displacing plaintiff's existing or potential market may infringe upon an underlying copyrighted work, sound collages serving a more critical or artistic function may deserve protection under fair use standards adopted to address legitimate works of parody.

Many collage compositions use pre-existing musical elements to evoke new responses from the listener. By generating new meaning out of old texts, these collages may evoke the pleasure of recognition, implicate critical social issues, or create challenging, dense textual structures impenetrable to all but the most adventuresome listener. While these audio collages may be analogized to eorks of parody, they do not always resort to ridicule or comic effect. Yet audio collages need not resort to parody to be considered challenging or important works. John Lennon's *Revolution #9* includes moments of levity, but operates primarily as a powerful audio corollary to the many social and cultural upheavals occurring throughout the 1960s.

Social and critical barriers separating "high" art from the popular arts have eroded significantly in the last century, particularly in the area of modern music and especially within that genre of composition based on previously existing works– the audio collage. Sophisticated audio and visual technology currently permits widespread access to the ideas and artistic practices of Filippo Tommaso Marinetti, Luigi and Antonio Russolo and Kurt Schwitters, controversial artists who pioneered new theories of sound at the beginning of the century. As Justice Holmes once observed in determining whether certain works of visual art deserve copyright protection:

"It would be a dangerous undertaking for persons trained only in law to constitute themselves final judges of the worth of pictorial illustrations, outside the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their authors spoke."[221]

The collage group Negativland rephrases Justice Holmes' concerns, asking *"at what point in the process of found sound incorporation does the new creation possess its own unique identity which supersedes the sum of its parts, thus gaining artistic license?"*[222]

As this article has shown, issues of artistic license and artistic licensing are at the core of the debate surrounding this music. While some commentators have suggested some form of compulsory licensing to resolve the copyright concerns surrounding digital sampling, such a scheme must not make the practice of audio collage prohibitively expensive. Rather, any licensing scheme must be based on the understanding that collage artists can painstakingly create collage-based works out of potentially hundreds of sound recordings.

Hopefully, a legislative solution will one day be adopted to deal with the copyright concerns arising from the increased popularity of audio collage recordings, with collage artists retaining some voice in the drafting of such a solution. Until any solution does emerge, however, it will be left to the courts to decide exactly how much appropriation of a pre-existing sound recording constitutes a fair use, and under what circumstances. In reaching their decision, it is hoped that these courts will take into account the cultural and historical legitimacy of collage techniques, techniques which have bridged the gap between popular and experimental composition, and created some of this century's most vital and expressive music.

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214. *Schaab v. Kleindienst*, 345 F. Supp. 589, 590 (D.C.D.C. 1972).

215. See E.S. Johnson, *Protecting Distinctive Sounds: The Challenge of Digital Sampling*, 1988 *Ent., Pub. and the Arts Handbook* 159 (1988).

216. Needle-drop services provide for the licensing of sound effects and music on a time-use basis.

217. A shrink-wrap license is a contract of adhesion, printed and covered in "shrink wrap" on the outer wrapper of a software package. Such a license indicates that opening the package constitutes an acceptance of the license terms. See Maher, *The Shrink-Wrap License: Old Problems in a New Wrapper*, 34 *J. Copyright Soc'y U.S.A.* 292 (1987).

218. Oswald, *supra*, note 37, at 104. Oswald cites composer John Tenney's *Blue Suede Shoes* as fulfilling Milton's stipulation that piracy or plagiarism of a work occurs only if it is not bettered by the borrower. *Id.*

219. The band War developed an innovative solution by permitting rappers to use samples of the band's recordings in exchange for compensation, attribution, and permission to include these derivative compositions on an homage LP entitled *Rap Declares War.* Britt, *Everybody Wins: War's Album Makes Peace With Rappers*, Chicago Tribune, Dec. 17, 1992, at 13D.

220. P. Yates, *Twentieth Century Music* 41 (1967).

221. *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903).

222. *Negativland*, *supra*, note 95.

H. *Domains of Origin vs. Domains of Use* by Walter Alter

domains of origin vs domains of use

from a theoretical standpoint, it is now possible, within the paradigm of electronic culture, to differentiate between the domains of access to technology and domains of access to the content of technology. the content of electronic technology is ultimately the replication information. whereas the technology itself, a fax machine for example, is difficult for the individual to replicate (requiring the manufacture and assembly of the constituent parts in a home workshop), the information carried on the fax machine is not. once you distinguish between the tool itself and the functions that the tool was designed to carry out, it becomes simple to decide matters of copyright by assigning qualities of patent.

obviously, a tool need not be a thing fashioned out of steel or plastic or copper wire. a tool can be a particular set of programming code used for the manipulation of information, i.e., information operating upon itself according to a proprietary design. yet the operant distinction is that of a tool that was invented where one did not previously exist.

in the realm of artistic creation, it then becomes necessary to either conceive or not conceive of an object of art as a tool. this is up to the artist. if an artist, a composer let's say, wishes to copyright a song, then, he or she should declare the specifications of the song as one would a tool, ie., a description of the tonic modality, the tonic sequence and note durations that define the basic tune, the time signature, and any other blueprintable factors that make up the composition.

most importantly, the copyright/patent should contain a statement of purpose for which the work of art was designed, much like a list of ingredients on a package, but one differentiated into specifics as to the aim and desired effect of the art work upon the individual end user. it would thus be necessary to state something like "this song was designed to create a mood of tranquility and uncritical acceptance of vagaries of fate within the listener." or possibly "this song was designed to create a sense of outrage against the clandestine political machinations of monopolistic institutions and their attendant bureaucracies".

by requiring an artist or a corporation distributing commodity works of art to declare a tool-like purpose for their product, we could cut through the crap of subjective personal experience, talent and wisdom being conceived of as something other than a commodity. if a work of art is required to be DEFINED AS A TOOL COMMODITY in order to be sold within a market intrinsically composed of tool commodity values, it is patentable. if a work of art is defined by its creator as a NON-COMMODITY, i.e., absolutely without value and, simultaneously, absolutely priceless and therefore in a domain of pure origin, then no royalty may be demanded, although voluntary donations of any amount of specie or barter may be petitioned.

a new convention would emerge from this schematic, one that would distinguish between two kinds of artist- a) commodity tool making artists or "comptoolers" and b) free agent ideational artists or "free-agers". this schematic, if adopted, would end the clandestine tunneling of ideology and hidden agenda social programming within the arts. muzak and other broadcast media wallpaper entering our conscious life via the vehicle of esthetics would be subject to environmental law. with every song, video, movie, book, concert, painting, gallery photograph, etc. that comes with a price tag being labeled or prefaced with a detailed statement of its constituent parts, its aims and its methods, there would emerge, in short order, a wholly new approach to artistic creativity and the coercive economics that currently support the artist.

walter alter

I. The Supreme Court's 2 Live Crew Decision

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

Case No. 92-1292

LUTHER R. CAMPBELL AKA LUKE SKYYWALKER, ET AL., PETITIONERS v. ACUFF-ROSE MUSIC, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MARCH 7, 1994

(Unanimous decision.)

❖ ❖ ❖

Justice Souter delivered the opinion of the Court.

We are called upon to decide whether 2 Live Crew's commercial parody of Roy Orbison's song, "Oh, Pretty Woman," may be a fair use within the meaning of the Copyright Act of 1976, 17 U.S.C. Section 107 (1988 ed. and Supp. IV). Although the District Court granted summary judgment for 2 Live Crew, the Court of Appeals reversed, holding the defense of fair use barred by the song's commercial character and excessive borrowing. Because we hold that a parody's commercial character is only one element to be weighed in a fair use enquiry, and that insufficient consideration was given to the nature of parody in weighing the degree of copying, we reverse and remand.

I

In 1964, Roy Orbison and William Dees wrote a rock ballad called "Oh, Pretty Woman" and assigned their rights in it to respondent Acuff-Rose Music, Inc. See Appendix A, *infra*, at 26. Acuff-Rose registered the song for copyright protection.

Petitioners Luther R. Campbell, Christopher Wongwon, Mark Ross, and David Hobbs are collectively known as 2 Live Crew, a popular rap music group.[1] In 1989, Campbell wrote a song entitled "Pretty Woman," which he later described in an affidavit as intended, "through comical lyrics, to satirize the original work . . . ." App. to Pet. for Cert. 80a. On July 5, 1989, 2 Live Crew's manager informed Acuff-Rose that 2 Live Crew had written a parody of "Oh, Pretty Woman," that they would afford all credit for ownership and authorship of the original song to Acuff-Rose, Dees, and Orbison, and that they were willing to pay a fee for the use they wished to make of it. Enclosed with the letter were a copy of the lyrics and a recording of 2 Live Crew's song. See Appendix B, *infra*, at 27. Acuff-Rose's agent refused permission, stating that "I am aware of the success enjoyed by 'The 2 Live Crews', but I must inform you that we cannot permit the use of a parody of 'Oh, Pretty Woman.'" App. to Pet. for Cert. 85a. Nonetheless, in June or July 1989[2], 2 Live Crew released records, cassette tapes, and compact discs of "Pretty Woman" in a collection of songs entitled "As Clean As They Wanna Be." The albums and compact discs identify the authors of "Pretty Woman" as Orbison and Dees and its publisher as Acuff-Rose.

Almost a year later, after nearly a quarter of a million copies of the recording had been sold, Acuff-Rose sued 2 Live Crew and its record company, Luke Skyywalker Records, for copyright infringement. The District Court granted summary judgment for 2 Live Crew[3], reasoning that the commercial purpose of 2 Live Crew's song was no bar to fair use; that 2 Live Crew's version was a parody, which "quickly degenerates into a play on words, substituting predictable lyrics with shocking ones" to show "how bland and banal the Orbison song" is; that 2 Live Crew had taken no more than was necessary to "conjure up" the original in order to parody it; and that it was "extremely unlikely that 2 Live Crew's song could adversely affect the market for the original." 754 F. Supp. 1150, 1154-1155, 1157-1158 (MD Tenn. 1991). The District Court weighed these factors and held that 2 Live Crew's song made fair use of Orbison's original. *Id.*, at 1158-1159.

The Court of Appeals for the Sixth Circuit reversed and remanded. 972 F. 2d 1429, 1439 (1992). Although it assumed for the purpose of its opinion that 2 Live Crew's song was a parody of the Orbison original, the Court of Appeals thought the District Court had put too little emphasis on the fact that "every commercial use . . . is presumptively . . . unfair," *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 451 (1984), and it held that "the admittedly commercial nature" of the parody "requires the conclusion" that the first of four factors relevant under the statute weighs against a finding of fair use. 972 F.2d, at 1435, 1437. Next, the Court of Appeals determined that, by "taking the heart of the original and making it the heart of a new work," 2 Live Crew had, qualitatively, taken too much. *Id., at 1438.* Finally, after noting that the effect on the potential market for the original (and the market for derivative works) is "undoubtedly the single most important element of fair use," *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985), the Court of Appeals faulted the District Court for "refusing to indulge the presumption" that "harm for purposes of the fair use analysis has been established by the presumption attaching to commercial uses." 972 F. 2d, at 1438-1439. In sum, the court concluded that its "blatantly commercial purpose . . . prevents this parody from being a fair use." *Id.*, at 1439.

We granted certiorari, 507 U.S. ___ (1993), to determine whether 2 Live Crew's commercial parody could be a fair use.

II

It is uncontested here that 2 Live Crew's song would be an infringement of Acuff-Rose's rights in "Oh, Pretty Woman," under the Copyright Act of 1976, 17 U.S.C. § 106 (1988 ed. and Supp. IV), but for a finding of fair use through parody[4]. From the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, "to promote the Progress of Science and useful Arts . . . ." U.S. Const., Art. 1, § 8, cl. 8[5]. For as Justice Story explained, "in truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense, are strictly new and original throughout. Every book in litera-

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1. Rap has been defined as a "style of black American popular music consisting of improvised rhymes performed to a rhythmic accompaniment." The Norton/Grove Concise Encyclopedia of Music 613 (1988). 2 Live Crew plays "[b]ass music," a regional, hip-hop style of rap from the Liberty City area of Miami, Florida. Brief for Petitioners 34.

2. The parties argue about the timing. 2 Live Crew contends that the album was released on July 15, and the District Court so held. 754 F. Supp. 1150, 1152 (MD Tenn. 1991). The Court of Appeals states that Campbell's affidavit puts the release date in June, and chooses that date. 972 F. 2d 1429, 1432 (CA6 1992). We find the timing of the request irrelevant for purposes of this enquiry. See n. 18, *infra*, discussing good faith.

3. 2 Live Crew's motion to dismiss was converted to a motion for summary judgment. Acuff-Rose defended against the motion, but filed no cross-motion.

4. Section 106 provides in part:

"Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

"(1) to reproduce the copyrighted work in copies or phonorecords;

"(2) to prepare derivative works based upon the copyrighted work;

"(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending . . . ."

A derivative work is defined as one "based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a 'derivative work.'" 17 U.S.C. § 101.

2 Live Crew concedes that it is not entitled to a compulsory license under § 115 because its arrangement changes "the basic melody or fundamental character" of the original. § 115(a)(2).

ture, science and art, borrows, and must necessarily borrow, and use much which was well known and used before." *Emerson v. Davies*, 8 F. Cas. 615, 619 (No. 4,436) (CCD Mass. 1845). Similarly, Lord Ellenborough expressed the inherent tension in the need simultaneously to protect copyrighted material and to allow others to build upon it when he wrote, "while I shall think myself bound to secure every man in the enjoyment of his copy-right, one must not put manacles upon science." *Carey v. Kearsley*, 4 Esp. 168, 170, 170 Eng. Rep. 679, 681 (K.B. 1803). In copyright cases brought under the Statute of Anne of 1710[6], English courts held that in some instances "fair abridgements" would not infringe an author's rights, see W. Patry, The Fair Use Privilege in Copyright Law 6-17 (1985) (hereinafter Patry); Leval, Toward a Fair Use Standard, 103 Harv. L. Rev. 1105, 1105 (1990) (hereinafter Leval), and although the First Congress enacted our initial copyright statute, Act of May 31, 1790, 1 Stat. 124, without any explicit reference to "fair use," as it later came to be known[7], the doctrine was recognized by the American courts nonetheless.

In *Folsom v. Marsh*, Justice Story distilled the essence of law and methodology from the earlier cases: "look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work." 9 F. Cas. 342, 348 (No. 4,901) (CCD Mass. 1841). Thus expressed, fair use remained exclusively judge-made doctrine until the passage of the 1976 Copyright Act, in which Story's summary is discernible[8]:

> "§ 107. Limitations on exclusive rights: Fair use
>
> "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include–
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> "The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors." 17 U.S.C. § 107 (1988 ed. and Supp. IV).

Congress meant § 107 "to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way" and intended that courts continue the common law tradition of fair use adjudication. H. R. Rep. No. 94-1476, p 66 (1976) (hereinafter House Report); S. Rep. No. 94-473, p. 62 (1975) (hereinafter Senate Report). The fair use doctrine thus "permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Stewart v. Abend*, 495 U.S. 207, 236 (1990) (internal quotation marks and citation omitted).

The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis. *Harper & Row*, 471 U.S., at 560; *Sony*, 464 U.S., at 448, and n. 31; House Report, pp. 65-66; Senate Report, p. 62. The text employs the terms "including" and "such as" in the preamble paragraph to indicate the "illustrative and not limitative" function of the examples given, § 101; see *Harper & Row, supra*, at 561, which thus provide only general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses[9]. Nor may the four statutory factors be treated in isolation, one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright. See Leval 1110-1111; Patry & Perlmutter, Fair Use Misconstrued: Profit, Presumptions, and Parody, 11 Cardozo Arts & Ent. L. J. 667, 685-687 (1993) (hereinafter Patry & Perlmutter)[10].

A

The first factor in a fair use enquiry is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." § 107(1). This factor draws on Justice Story's formulation, "the nature and objects of the selections made." *Folsom v. Marsh*, 9 F. Cas., at 348. The enquiry here may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like, see § 107. The central purpose of this investigation is to see, in Justice Story's words, whether the new work merely "supersedes the objects" of the original creation, *Folsom v. Marsh, supra*, at 348; accord, *Harper & Row, supra*, at 562 ("supplanting" the original), or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative." Leval 1111. Although such transformative use is not absolutely necessary for a finding of fair use, *Sony, supra*, at 455, n.40[11], the goal of copyright, to promote science and the arts, is generally furthered by the creation of transformative works. Such works thus lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright, see, e. g., *Sony, supra*, at 478-480 (Justice Blackmun, dissenting), and the more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.

This Court has only once before even considered whether parody may be fair use, and that time issued no opinion because of the Court's equal division. *Benny v. Loew's Inc.*, 239 F. 2d 532 (CA9 1956), aff'd *sub nom. Columbia Broadcasting System, Inc. v. Loew's Inc.*, 356 U.S. 43 (1958). Suffice it to say now that parody has an obvious claim to transformative value, as Acuff-Rose itself does not deny. Like less ostensibly humorous forms of criticism, it can provide social benefit, by shedding light on an earlier work, and, in the process, creating a new one. We thus line up with the courts that have held that parody, like other comment or criticism, may claim fair use under § 107. See, e. g., *Fisher v. Dees*, 794 F. 2d 432 (CA9 1986) ("When Sonny Sniffs Glue," a parody of "When Sunny Gets Blue," is fair use); *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741 (SDNY), aff'd, 623 F. 2d 252 (CA2 1980) ("I Love Sodom," a "Saturday Night Live" television parody of "I Love New York" is fair use); see also House Report, p. 65; Senate Report, p. 61 ("Use in a parody of some of the content of the work parodied" may be fair use).

The germ of parody lies in the definition of the Greek *parodeia*, quoted in Judge Nelson's Court of Appeals dissent, as "a song sung alongside another." 972 F. 2d, at 1440, quoting 7 Encyclope-

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5. The exclusion of facts and ideas from copyright protection serves that goal as well. See Section 102(b) ("In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery . . . "); *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 359 (1991) ("Facts contained in existing works may be freely copied"); Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 547 (1985) (copyright owner's rights exclude facts and ideas, and fair use).

6. An Act for the Encouragement of Learning, 8 Anne, ch. 19.

7. Patry 27, citing *Lawrence v. Dana*, 15 F. Cas. 26, 60 (No. 8,136) (CCD Mass. 1869).

8. Leval 1105. For a historical account of the development of the fair use doctrine, see Patry 1-64.

9. See Senate Report, p. 62 ("Whether a use referred to in the first sentence of section 107 is a fair use in a particular case will depend upon the application of the determinative factors").

10. Because the fair use enquiry often requires close questions of judgment as to the extent of permissible borrowing in cases involving parodies (or other critical works), courts may also wish to bear in mind that the goals of the copyright law, "to stimulate the creation and publication of edifying matter," Leval 1134, are not always best served by automatically granting injunctive relief when parodists are found to have gone beyond the bounds of fair use. See 17 U.S.C. § 502(a) (court "*may*...grant...injunctions on such terms as it may deem reasonable to prevent or restrain infringement") (emphasis added); Leval 1132 (while in the "vast majority of cases, [an injunctive] remedy is justified because most infringements are simple piracy," such cases are "worlds apart from many of those raising reasonable contentions of fair use" where "there may be a strong public interest in the publication of the secondary work [and] the copyright owner's interest may be adequately protected by an award of damages for whatever infringement is found"); *Abend v. MCA, Inc.*, 863 F.2d 1465, 1479 (CA9 1988) (finding "special circumstances" that would cause "great injustice" to defendants and "public injury" were injunction to issue), aff'd *sub nom. Stewart v. Abend*, 495 U.S. 207 (1990).

11. The obvious statutory exception to this focus on transformative uses is the straight reproduction of multiple copies for classroom distribution.

dia Britannica 768 (15th ed. 1975). Modern dictionaries accordingly describe a parody as a "literary or artistic work that imitates the characteristic style of an author or a work for comic effect or ridicule,"[12] or as a "composition in prose or verse in which the characteristic turns of thought and phrase in an author or class of authors are imitated in such a way as to make them appear ridiculous."[13] For the purposes of copyright law, the nub of the definitions, and the heart of any parodist's claim to quote from existing material, is the use of some elements of a prior author's composition to create a new one that, at least in part, comments on that author's works. See, e. g., *Fisher v. Dees*, *supra*, at 437; *MCA, Inc. v. Wilson*, 677 F.2d 180, 185 (CA2 1981). If, on the contrary, the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger.[14] Parody needs to mimic an original to make its point, and so has some claim to use the creation of its victim's (or collective victims') imagination, whereas satire can stand on its own two feet and so requires justification for the very act of borrowing.[15] See *Ibid.*; Bisceglia, Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, p. 25 (1987).

The fact that parody can claim legitimacy for some appropriation does not, of course, tell either parodist or judge much about where to draw the line. Like a book review quoting the copyrighted material criticized, parody may or may not be fair use, and petitioner's suggestion that any parodic use is presumptively fair has no more justification in law or fact than the equally hopeful claim that any use for news reporting should be presumed fair, see *Harper & Row*, 471 U.S., at 561. The Act has no hint of an evidentiary preference for parodists over their victims, and no workable presumption for parody could take account of the fact that parody often shades into satire when society is lampooned through its creative artifacts, or that a work may contain both parodic and non-parodic elements. Accordingly, parody, like any other use, has to work its way through the relevant factors, and be judged case by case, in light of the ends of the copyright law.

Here, the District Court held, and the Court of Appeals assumed, that 2 Live Crew's "Pretty Woman" contains parody, commenting on and criticizing the original work, whatever it may have to say about society at large. As the District Court remarked, the words of 2 Live Crew's song copy the original's first line, but then "quickly degenerat[e] into a play on words, substituting predictable lyrics with shocking ones . . . [that] derisively demonstrat[e] how bland and banal the Orbison song seems to them." 754 F. Supp., at 1155 (footnote omitted). Judge Nelson, dissenting below, came to the same conclusion, that the 2 Live Crew song "was clearly intended to ridicule the white-bread original" and "reminds us that sexual congress with nameless streetwalkers is not necessarily the stuff of romance and is not necessarily without its consequences. The singers (there are several) have the same thing on their minds as did the lonely man with the nasal voice, but here there is no hint of wine and roses." 972 F. 2d, at 1442. Although the majority below had difficulty discerning any criticism of the original in 2 Live Crew's song, it assumed for purposes of its opinion that there was some. *Id.*, at 1435-1436, and n. 8.

We have less difficulty in finding that critical element in 2 Live Crew's song than the Court of Appeals did, although having found it we will not take the further step of evaluating its quality. The threshold question when fair use is raised in defense of parody is whether a parodic character may reasonably be perceived.[16] Whether, going beyond that, parody is in good taste or bad does not and should not matter to fair use. As Justice Holmes explained, "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of [a work], outside of the narrowest and most obvious limits. At the one extreme some works of genius would be sure to miss appreciation. Their very novelty would make them repulsive until the public had learned the new language in which their author spoke." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251 (1903) (circus posters have copyright protection); cf. *Yankee Publishing Inc. v. News America Publishing, Inc.*, 809 F. Supp. 267, 280 (SDNY 1992) (Leval, J.) ("First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed") (trademark case).

While we might not assign a high rank to the parodic element here, we think it fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree. 2 Live Crew juxtaposes the romantic musings of a man whose fantasy comes true, with degrading taunts, a bawdy demand for sex, and a sigh of relief from paternal responsibility. The later words can be taken as a comment on the naivete of the original of an earlier day, as a rejection of its sentiment that ignores the ugliness of street life and the debasement that it signifies. It is this joinder of reference and ridicule that marks off the author's choice of parody from the other types of comment and criticism that traditionally have had a claim to fair use protection as transformative works.[17]

The Court of Appeals, however, immediately cut short the enquiry into 2 Live Crew's fair use claim by confining its treatment of the first factor essentially to one relevant fact, the commercial nature of the use. The court then inflated the significance of this fact by applying a presumption ostensibly culled from *Sony*, that "every commercial use of copyrighted material is presumptively . . . unfair . . ." *Sony*, 464 U.S., at 451. In giving virtually dispositive weight to the commercial nature of the parody, the Court of Appeals erred.

The language of the statute makes clear that the commercial or nonprofit educational purpose of a work is only one element of the first factor enquiry into its purpose and character. Section 107(1) uses the term "including" to begin the dependent clause referring to commercial use, and the main clause speaks of a broader investigation into "purpose and character." As we explained in *Harper & Row*, Congress resisted attempts to narrow the ambit of this traditional enquiry by adopting categories of presumptively fair use, and it urged courts to preserve the breadth of their traditionally ample view of the universe of relevant evidence. 471 U.S., at 561; House Report, p. 66. Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness. If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of Section 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities "are generally conducted for profit in this country." *Harper & Row, supra*, at 592 (Brennan, J. dissenting). Congress could not have intended such a rule, which certainly is not inferable from the common-law cases, arising as they did from the world of letters in which Samuel Johnson could pronounce that "[n]o man but a blockhead ever wrote, except for money." 3 Boswell's Life of Johnson 19 (G. Hill ed. 1934).

Sony itself called for no hard evidentiary presumption. There, we emphasized the need for a "sensitive balancing of interests," 464 U.S., at 455, n. 40, noted that Congress had "eschewed a rigid, bright-line approach to fair use," *id., at 449, n. 31,*

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12. The American Heritage Dictionary 1317 (3d ed. 1992).

13. 11 The Oxford English Dictionary 247 (2d ed. 1989).

14. A parody that more loosely targets an original than the parody presented here may still be sufficiently aimed at an original work to come within our analysis of parody. If a parody whose wide dissemination in the market runs the risk of serving as a substitute for the original or licensed derivatives (see *infra*, discussing factor four), it is more incumbent on one claiming fair use to establish the extent of transformation and the parody's critical relationship to the original. By contrast, when there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for the borrowing than would otherwise be required.

15. Satire has been defined as a work "in which prevalent follies or vices are assailed with ridicule," 14 The Oxford English Dictionary 500 (2d ed. 1989), or are "attacked through irony, derision, or wit," The American Heritage Dictionary 1604 (3d ed. 1992).

16. The only further judgment, indeed, that a court may pass on a work goes to an assessment of whether the parodic element is slight or great, and the copying small or extensive in relation to the parodic element, for a work with slight parodic element and extensive copying will be more likely to merely "supersede the objects" of the original. See *infra*, at ___, discussing factors three and four.

17. We note in passing that 2 Live Crew need not label its whole album, or even this song, a parody in order to claim fair use protection, nor should 2 Live Crew be penalized for this being its first parodic essay. Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious, (or even the reasonably perceived). See Patry & Perlmutter 716-717.

and stated that the commercial or nonprofit educational character of a work is "not conclusive," *id.*, at 448-449, but rather a fact to be "weighed along with others in fair use decisions." *Id.*, at 449, n. 32 (quoting House Report, p. 66). The Court of Appeals's elevation of one sentence from *Sony* to a *per se* rule thus runs as much counter to *Sony* itself as to the long common-law tradition of fair use adjudication. Rather, as we explained in *Harper & Row*, *Sony* stands for the proposition that the "fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use." 471 U.S., at 562. But that is all, and the fact that even the force of that tendency will vary with the context is a further reason against elevating commerciality to hard presumptive significance. The use, for example, of a copyrighted work to advertise a product, even in a parody, will be entitled to less indulgence under the first factor of the fair use enquiry, than the sale of a parody for its own sake, let alone one performed a single time by students in school. See generally Patry & Perlmutter 679-680; *Fisher v. Dees*, 794 F.2d, at 437; *Maxtone-Graham v. Burtchaell*, 803 F. 2d 1253, 1262 (CA2 1986); *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F. 2d 1510, 1522 (CA9 1992).[18]

B

The second statutory factor, "the nature of the copyrighted work," § 107(2), draws on Justice Story's expression, the "value of the materials used." *Folsom v. Marsh*, 9 F. Cas., at 348. This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied. See, e. g., *Stewart v. Abend*, 495 U.S., at 237-238 (contrasting fictional short story with factual works); *Harper & Row*, 471 U.S., at 563-564 (contrasting soon-to-be-published memoir with published speech); *Sony*, 464 U.S., at 455, n. 40 (contrasting motion pictures with news broadcasts); *Feist*, 499 U.S., at 348-351 (contrasting creative works with bare factual compilations); 3 M. Nimmer & D. Nimmer, Nimmer on Copyright § 13.05[A][2] (1993) (hereinafter Nimmer); Leval 1116. We agree with both the District Court and the Court of Appeals that the Orbison original's creative expression for public dissemination falls within the core of the copyright's protective purposes. 754 F. Supp., at 1155-1156; 972 F. 2d, at 1437. This fact, however, is not much help in this case, or ever likely to help much in separating the fair use sheep from the infringing goats in a parody case, since parodies almost invariably copy publicly known, expressive works.

C

The third factor asks whether "the amount and substantiality of the portion used in relation to the copyrighted work as a whole," § 107(3) (or, in Justice Story's words, "the quantity and value of the materials used," *Folsom v. Marsh*, *supra*, at 348) are reasonable in relation to the purpose of the copying. Here, attention turns to the persuasiveness of a parodist's justification for the particular copying done, and the enquiry will harken back to the first of the statutory factors, for, as in prior cases, we recognize that the extent of permissible copying varies with the purpose and character of the use. See *Sony*, 464 U.S., at 449-450 (reproduction of entire work "does not have its ordinary effect of militating against a finding of fair use" as to home videotaping of television programs); *Harper & Row*, 471 U.S., at 564 ("Even substantial quotations might qualify as fair use in a review of a published work or a news account of a speech" but not in a scoop of a soon-to-be-published memoir). The facts bearing on this factor will also tend to address the fourth, by revealing the degree to which the parody may serve as a market substitute for the original or potentially licensed derivatives. See Leval 1123.

The District Court considered the song's parodic purpose in finding that 2 Live Crew had not helped themselves overmuch. 754 F. Supp., at 1156-1157. The Court of Appeals disagreed, stating that "[w]hile it may not be inappropriate to find that no more was taken than necessary, the copying was qualitatively substantial. . . . We conclude that taking the heart of the original and making it the heart of a new work was to purloin a substantial portion of the essence of the original." 972 F. 2d, at 1438.

The Court of Appeals is of course correct that this factor calls for thought not only about the quantity of the materials used, but about their quality and importance, too. In *Harper & Row*, for example, the Nation had taken only some 300 words out of President Ford's memoirs, but we signalled the significance of the quotations in finding them to amount to "the heart of the book," the part most likely to be newsworthy and important in licensing serialization. 471 U.S., at 564-566, 568 (internal quotation marks omitted). We also agree with the Court of Appeals that whether "a substantial portion of the infringing work was copied verbatim" from the copyrighted work is a relevant question, see *id.*, at 565, for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original.

Where we part company with the court below is in applying these guides to parody, and in particular to parody in the song before us. Parody presents a difficult case. Parody's humor, or in any event its comment, necessarily springs from recognizable allusion to its object through distorted imitation. Its art lies in the tension between a known original and its parodic twin. When parody takes aim at a particular original work, the parody must be able to "conjure up" at least enough of that original to make the object of its critical wit recognizable. See, *e. g.*, *Elsmere Music*, 623 F. 2d, at 253, n. 1; *Fisher v. Dees*, 794 F. 2d, at 438-439. What makes for this recognition is quotation of the original's most distinctive or memorable features, which the parodist can be sure the audience will know. Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original or, in contrast, the likelihood that the parody may serve as a market substitute for the original. But using some characteristic features cannot be avoided.

We think the Court of Appeals was insufficiently appreciative of parody's need for the recognizable sight or sound when it ruled 2 Live Crew's use unreasonable as a matter of law. It is true, of course, that 2 Live Crew copied the characteristic opening bass riff (or musical phrase) of the original, and true that the words of the first line copy the Orbison lyrics. But if quotation of the opening riff and the first line may be said to go to the "heart" of the original, the heart is also what most readily conjures up the song for parody, and it is the heart at which parody takes aim. Copying does not become excessive in relation to parodic purpose merely because the portion taken was the original's heart. If 2 Live Crew had copied a significantly less memorable part of the original, it is difficult to see how its parodic character would have come through. See *Fisher v. Dees*, 794 F. 2d, at 439.

This is not, of course, to say that anyone who calls himself a parodist can skim the cream and get away scot free. In parody, as in news reporting, see *Harper & Row*, *supra*, context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original. It is significant that 2 Live Crew not only copied the first line of the original, but thereafter departed markedly from the Orbison lyrics for its own ends. 2 Live Crew not only copied the bass riff and repeated it[19], but also produced otherwise distinctive sounds, interposing "scraper" noise, overlaying the music with solos in different keys, and altering the drum beat. See 754 F. Supp., at 1155. This is not a case, then, where "a substantial portion" of the parody itself is composed of a "verbatim" copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying, that the third factor must be resolved as a matter of law against the parodists.

Suffice it to say here that, as to the lyrics, we think the Court of Appeals correctly suggested that "no more was taken than necessary," 972 F. 2d, at 1438, but just for that reason, we fail to see how the copying can be excessive in relation to its parodic purpose, even if the portion taken is the original's "heart." As to the music, we express no opinion whether repetition of the bass riff is excessive copying, and we remand to permit evaluation of the amount taken, in light of the song's parodic purpose and character, its transformative

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[18] Finally, regardless of the weight one might place on the alleged infringer's state of mind, compare *Harper & Row*, 471 U.S., at 562 (fair use presupposes good faith and fair dealing) (quotation marks omitted), with *Folsom v. Marsh*, 9 F. Cas. 342, 349 (No. 4,901) (CCD Mass. 1841) (good faith does not bar a finding of infringement); Leval 1126-1127 (good faith irrelevant to fair use analysis), we reject Acuff-Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew's actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use. See *Fisher v. Dees*, 794 F. 2d 432, 437 (CA9 1986).

[19] This may serve to heighten the comic effect of the parody, as one witness stated, App. 32a, Affidavit of Oscar Brand; see also *Elsmere Music, Inc. v. National Broadcasting Co.*, 482 F. Supp. 741, 747 (SDNY 1980) (repetition of "I Love Sodom"), or serve to dazzle with the original's music, as Acuff-Rose now contends.

elements, and considerations of the potential for market substitution sketched more fully below.

D

The fourth fair use factor is "the effect of the use upon the potential market for or value of the copyrighted work." § 107(4). It requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also "whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market" for the original. Nimmer Section 13.05[A][4], p. 13-102.61 (footnote omitted); accord *Harper & Row*, 471 U.S., at 569; Senate Report, p. 65; *Folsom v. Marsh*, 9 F. Cas., at 349. The enquiry "must take account not only of harm to the original but also of harm to the market for derivative works." *Harper & Row, supra*, at 568.

Since fair use is an affirmative defense[20], its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets[21]. In moving for summary judgment, 2 Live Crew left themselves at just such a disadvantage when they failed to address the effect on the market for rap derivatives, and confined themselves to uncontroverted submissions that there was no likely effect on the market for the original. They did not, however, thereby subject themselves to the evidentiary presumption applied by the Court of Appeals. In assessing the likelihood of significant market harm, the Court of Appeals quoted from language in *Sony* that "'if the intended use is for commercial gain, that likelihood may be presumed. But if it is for a noncommercial purpose, the likelihood must be demonstrated.'" 972 F. 2d, at 1438, quoting *Sony*, 464 U.S., at 451. The court reasoned that because "the use of the copyrighted work is wholly commercial, . . . we presume a likelihood of future harm to Acuff-Rose exists." 972 F.2d, at 1438. In so doing, the court resolved the fourth factor against 2 Live Crew, just as it had the first, by applying a presumption about the effect of commercial use, a presumption which as applied here we hold to be error.

No "presumption" or inference of market harm that might find support in *Sony* is applicable to a case involving something beyond mere duplication for commercial purposes. *Sony's* discussion of a presumption contrasts a context of verbatim copying of the original in its entirety for commercial purposes, with the non-commercial context of *Sony* itself (home copying of television programming). In the former circumstances, what *Sony* said simply makes common sense: when a commercial use amounts to mere duplication of the entirety of an original, it clearly "supersedes the objects," *Folsom v. Marsh*, 9 F. Cas., at 348, of the original and serves as a market replacement for it, making it likely that cognizable market harm to the original will occur. *Sony*, 464 U.S., at 451. But when, on the contrary, the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred. Indeed, as to parody pure and simple, it is more likely that the new work will not affect the market for the original in a way cognizable under this factor, that is, by acting as a substitute for it ("superseding [its] objects"). See Leval 1125; Patry & Perlmutter 692, 697-698. This is so because the parody and the original usually serve different market functions. Bisceglia, ASCAP, Copyright Law Symposium, No. 34, p. 23.

We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theater review, kills demand for the original, it does not produce a harm cognizable under the Copyright Act. Because "parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically," B. Kaplan, An Unhurried View of Copyright 69 (1967), the role of the courts is to distinguish between "[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it." *Fisher v. Dees*, 794 F. 2d, at 438.

This distinction between potentially remediable displacement and unremediable disparagement is reflected in the rule that there is no protectable derivative market for criticism. The market for potential derivative uses includes only those that creators of original works would in general develop or license others to develop. Yet the unlikelihood that creators of imaginative works will license critical reviews or lampoons of their own productions removes such uses from the very notion of a potential licensing market. "People ask . . . for criticism, but they only want praise." S. Maugham, Of Human Bondage 241 (Penguin ed. 1992). Thus, to the extent that the opinion below may be read to have considered harm to the market for parodies of "Oh, Pretty Woman," see 972 F.2d, at 1439, the court erred. Accord, *Fisher v. Dees*, 794 F. 2d, at 437; Leval 1125; Patry & Perlmutter 688-691[22].

In explaining why the law recognizes no derivative market for critical works, including parody, we have, of course, been speaking of the later work as if it had nothing but a critical aspect (i.e., "parody pure and simple," *supra*, at 22). But the later work may have a more complex character, with effects not only in the arena of criticism but also in protectable markets for derivative works, too. In that sort of case, the law looks beyond the criticism to the other elements of the work, as it does here. 2 Live Crew's song comprises not only parody but also rap music, and the derivative market for rap music is a proper focus of enquiry, see *Harper & Row*, 471 U.S., at 568; Nimmer §13.05[B]. Evidence of substantial harm to it would weigh against a finding of fair use[23], because the licensing of derivatives is an important economic incentive to the creation of originals. See 17 U.S.C. § 106(2) (copyright owner has rights to derivative works). Of course, the only harm to derivatives that need concern us, as discussed above, is the harm of market substitution. The fact that a parody may impair the market for derivative uses by the very effectiveness of its critical commentary is no more relevant under copyright than the like threat to the original market[24].

Although 2 Live Crew submitted uncontroverted affidavits on the question of market harm to the original, neither they, nor Acuff-Rose, introduced evidence or affidavits addressing the likely effect of 2 Live Crew's parodic rap song on the market for a non-parody, rap version of "Oh, Pretty Woman." And while Acuff-Rose would have us find evidence of a rap market in the very facts that 2 Live Crew recorded a rap parody of "Oh, Pretty Woman" and another rap group sought a license to record a rap derivative, there was no evidence that a potential rap market was harmed in any way by 2 Live Crew's parody, rap version. The fact that 2 Live Crew's parody sold as part of a collection of rap songs says very little about the parody's effect on a market for a rap version of the original, either of the music alone or of the music with its lyrics. The District Court essentially passed on this issue, observing that Acuff-Rose is free to record "whatever version of the original it desires," 754 F. Supp., at 1158; the Court of Appeals went the other way by erroneous presumption. Contrary to each treatment, it is impossible to deal with the fourth factor except by recognizing that a silent record on an important factor bearing on fair use disentitled the proponent of the defense, 2 Live Crew, to summary judgment. The evidentiary hole will doubtless be plugged on remand.

III

It was error for the Court of Appeals to conclude that the commercial nature of 2 Live Crew's parody of "Oh, Pretty Woman" rendered it presumptively unfair. No such evidentiary presumption is available to address either the first factor, the character and purpose of the use, or the fourth, market harm, in determining whether a transformative use, such as parody, is a fair one. The court also erred in holding that 2 Live Crew had necessarily copied excessively from the Orbison original, considering the parodic purpose of the use. We therefore reverse the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.

It is so ordered.

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20. *Harper & Row*, 471 U.S., at 561; H. R. Rep. No. 102-836, p. 3, n. 3 (1992).

21. Even favorable evidence, without more, is no guarantee of fairness. Judge Leval gives the example of the film producer's appropriation of a composer's previously unknown song that turns the song into a commercial success; the boon to the song does not make the film's simple copying fair. Leval 1124, n. 84. This factor, no less than the other three, may be addressed only through a "sensitive balancing of interests." *Sony*, 464 U.S., at 455, n. 40. Market harm is a matter of degree, and the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors.

22. We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it.

23. See Nimmer Section 13.05[A][4], p. 13-102.61 ("a substantially adverse impact on the potential market"); Leval 1125 ("reasonably substantial" harm); Patry & Perlmutter 697-698 (same).

24. In some cases it may be difficult to determine whence the harm flows. In such cases, the other fair use factors may provide some indicia of the likely source of the harm. A work whose overriding purpose and character is parodic and whose borrowing is slight in relation to its parody will be far less likely to cause cognizable harm than a work with little parodic content and much copying.

APPENDIX A

"Oh, Pretty Woman" by Roy Orbison and William Dees

Pretty Woman, walking down the street,
Pretty Woman, the kind I like to meet,
Pretty Woman, I don't believe you,
you're not the truth,
No one could look as good as you
Mercy

Pretty Woman, won't you pardon me,
Pretty Woman, I couldn't help but see,
Pretty Woman, that you look lovely as can be
Are you lonely just like me?

Pretty Woman, stop a while,
Pretty Woman, talk a while,
Pretty Woman give your smile to me
Pretty woman, yeah, yeah, yeah
Pretty Woman, look my way,
Pretty Woman, say you'll stay with me
'Cause I need you, I'll treat you right
Come to me baby, Be mine tonight

Pretty Woman, don't walk on by,
Pretty Woman, don't make me cry,
Pretty Woman, don't walk away,
Hey, O. K.
If that's the way it must be, O. K.
I guess I'll go on home, it's late
There'll be tomorrow night, but wait!
What do I see
Is she walking back to me?
Yeah, she's walking back to me!
Oh, Pretty Woman.

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APPENDIX B

"Pretty Woman" as Recorded by 2 Live Crew

Pretty woman walkin' down the street
Pretty woman girl you look so sweet
Pretty woman you bring me down to that knee
Pretty woman you make me wanna beg please
Oh, pretty woman

Big hairy woman you need to shave that stuff
Big hairy woman you know I bet it's tough
Big hairy woman all that hair it ain't legit
'Cause you look like 'Cousin It'
Big hairy woman

Bald headed woman girl your hair won't grow
Bald headed woman you got a teeny weeny afro
Bald headed woman you know your hair could look nice
Bald headed woman first you got to roll it with rice
Bald headed woman here, let me get this hunk of biz for ya
Ya know what I'm saying you look better than rice a roni
Oh bald headed woman

Big hairy woman come on in
And don't forget your bald headed friend
Hey pretty woman let the boys
Jump in

Two timin' woman girl you know you ain't right
Two timin' woman you's out with my boy last night
Two timin' woman that takes a load off my mind
Two timin' woman now I know the baby ain't mine
Oh, two timin' woman
Oh pretty woman

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CONCURRING OPINION BY JUSTICE KENNEDY

I agree that remand is appropriate and join the opinion of the Court, with these further observations about the fair use analysis of parody.

The common-law method instated by the fair use provision of the copyright statute, 17 U.S.C. § 107 (1988 ed. and Supp. IV), presumes that rules will emerge from the course of decisions. I agree that certain general principles are now discernable to define the fair use exception for parody. One of these rules, as the Court observes, is that parody may qualify as fair use regardless of whether it is published or performed for profit. *Ante*, at 22. Another is that parody may qualify as fair use only if it draws upon the original composition to make humorous or ironic commentary about that same composition. *Ante*, at 10. It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well). See *Rogers v. Koons*, 960 F. 2d 301, 310 (CA2 1992) ("[T]hough the satire need not be only of the copied work and may . . . also be a parody of modern society, the copied work must be, at least in part, an object of the parody"); *Fisher v. Dees*, 794 F. 2d 432, 436 (CA9 1986) ("[A] humorous or satiric work deserves protection under the fair-use doctrine only if the copied work is at least partly the target of the work in question"). This prerequisite confines fair use protection to works whose very subject is the original composition and so necessitates some borrowing from it. See *MCA, Inc. v. Wilson*, 677 F. 2d 180, 185 (CA2 1981) ("[I]f the copyrighted song is not at least in part an object of the parody, there is no need to conjure it up"); Bisceglia, Parody and Copyright Protection: Turning the Balancing Act Into a Juggling Act, in ASCAP, Copyright Law Symposium, No. 34, pp. 23-29 (1987). It also protects works we have reason to fear will not be licensed by copyright holders who wish to shield their works from criticism. See *Fisher, supra*, at 437 ("Self-esteem is seldom strong enough to permit the granting of permission even in exchange for a reasonable fee"); Posner, When Is Parody Fair Use?, 21 J. Legal Studies 67, 73 (1992) ("There is an obstruction when the parodied work is a target of the parodist's criticism, for it may be in the private interest of the copyright owner, but not in the social interest, to suppress criticism of the work") (emphasis omitted).

If we keep the definition of parody within these limits, we have gone most of the way towards satisfying the four-factor fair use test in § 107. The first factor (the purpose and character of use) itself concerns the definition of parody. The second factor (the nature of the copyrighted work) adds little to the first, since "parodies almost invariably copy publicly known, expressive works." *Ante*, at 17. The third factor (the amount and substantiality of the portion used in relation to the whole) is likewise subsumed within the definition of parody. In determining whether an alleged parody has taken too much, the target of the parody is what gives content to the inquiry. Some parodies, by their nature, require substantial copying. See *Elsmere Music, Inc. v. National Broadcasting Co.*, 623 F. 2d 252 (CA2 1980) (holding that "I Love Sodom" skit on "Saturday Night Live" is legitimate parody of the "I Love New York" campaign). Other parodies, like Lewis Carroll's "You Are Old, Father William," need only take parts of the original composition. The third factor does reinforce the principle that courts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song or place the characters from a familiar work in novel or eccentric poses. See, *e. g., Walt Disney Productions v. Air Pirates*, 581 F. 2d 751 (CA9 1978); *DC Comics Inc. v. Unlimited Monkey Business, Inc.*, 598 F. Supp. 110 (ND Ga. 1984). But, as I believe the Court acknowledges, *ante*, at 18-20, it is by no means a test of mechanical application. In my view, it serves in effect to ensure compliance with the targeting requirement.

As to the fourth factor (the effect of the use on the market for the original), the Court acknowledges that it is legitimate for parody to suppress demand for the original by its critical effect. *Ante*, at 22-23. What it may not do is usurp demand by its substitutive effect. *Ibid.* It will be difficult, of course, for courts to determine whether harm to the market results from a parody's critical or substitutive effects. But again, if we keep the definition of parody within appropriate bounds, this inquiry may be of little significance. If a work targets another for humorous or ironic effect, it is by definition a new creative work. Creative works can compete with other creative works for the same market, even if their appeal is overlapping. Factor four thus underscores the importance of ensuring that the parody is in fact an independent creative work, which is why the parody must "make some critical comment or statement about the original work which reflects the original perspective of the parodist -- thereby giving the parody social value beyond its entertainment function." *Metro-Goldwyn-Mayer, Inc. v. Showcase Atlanta Cooperative Productions, Inc.*, 479 F. Supp. 351, 357 (ND Ga. 1979).

The fair use factors thus reinforce the importance of keeping the definition of parody within proper limits. More than arguable parodic content should be required to deem a would-be parody a fair use. Fair use is an affirmative defense, so doubts about whether a given use is fair should not be resolved in favor of the self-proclaimed parodist. We should not make it easy for musicians to exploit existing works and then later claim that their rendition was a valuable commentary on the original. Almost any revamped modern version of a familiar composition can be construed as a "comment on the naivete of the original," *ante*, at 13, because of the difference in style and because it will be amusing to hear how the old tune sounds in the new genre. Just the thought of a rap version of Beethoven's Fifth Symphony or "Achy, Breaky Heart" is bound to make people smile. If we allow any weak transformation to qualify as parody, however, we weaken the protection of copyright. And underprotection of copyright disserves the goals of copyright just as much as overprotection, by reducing the financial incentive to create.

The Court decides it is "fair to say that 2 Live Crew's song reasonably could be perceived as commenting on the original or criticizing it, to some degree." *Ante*, at 13 (applying the first fair use factor). While I am not so assured that 2 Live Crew's song is a legitimate parody, the Court's treatment of the remaining factors leaves room for the District Court to determine on remand that the song is not a fair use. As future courts apply our fair use analysis, they must take care to ensure that not just any commercial take-off is rationalized *post hoc* as a parody.

With these observations, I join the opinion of the Court.

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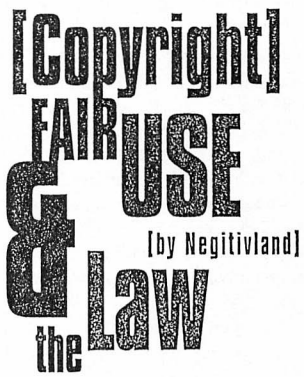
J. *Copyright, Fair Use, and the Law*, by Negativland (*Keyboard*, June 1994)

Who Should Read This Article:

1. Anyone concerned with protecting copyrighted works, in any medium, from infringers.
2. Anyone concerned with appropriating or "sampling" from those works.



A Report on the Supreme Court's Decision in the 2 Live Crew "Pretty Woman" Case

Introduction

Although popular media accurately reported the unanimous decision handed down by the US Supreme Court in the 2 Live Crew *Pretty Woman* parody case last March as positive for the group, it generally missed the fact that the Court didn't in fact decide the outcome of the case: They just instructed a lower court how to perform an evaluation of one aspect of it. More importantly, it missed the fact that the opinion, now the law of the land fully as much as any statute enacted by Congress, has repercussions far beyond this case, beyond even parody in general.

The decision constituted the most significant clarification of copyright law's 'fair use' guidelines in the electronic age, clarifying what kinds of reuse of copyrighted material U.S. courts may find allowable, and, in so doing, materially narrowed the definition of infringement for all copyrightable media. Another recent Supreme Court decision, *John Fogerty vs. Fantasy Inc.*, also discourages the filing of infringement suits by making it easier for some defendants who successfully fight off a copyright suit to get their attorney's fees paid by the other side.

In discussing their underlying reasoning, both opinions stress U.S. copyright law's original but lately forgotten purpose of promoting the creation and circulation of new works, and make it clear that copyright's protection of existing works arises not from inherent property rights but from that purpose, and must end where it would inhibit the creation of valuable new works.

Although fair use is a part of the same copyright law that prohibits out-and-out record piracy and similar whole, uncreative mass duplication of pre-existing tapes, CDs, videos, books, etc., for profit alone, those kinds of abuses have nothing to do with fair use and the new guidelines don't promote them in any way. Still, creators of copyrightable works need to be aware of these changes– especially if they anticipate involvement in litigation over a creative reuse of copyright-protected material, whether as plaintiff or defendant.

Before we can examine the 2 Live Crew decision in detail, an explanation of how fair use works is in order. But first, a basic knowledge of copyright law is necessary.

The Dawn of Copyright

"If creativity is a field, then copyright is the fence."

–John Oswald

Given the boggling chasm between, on the one hand, the prevailing notion that copyright is somehow supposed to exist for the benefit of creators and, on the other hand, the obvious inhibiting effect that excessive intellectual property protection measures have had on artists and technological innovators in recent years (*i.e.* unreleaseable sampling masterpieces, basic software patents that stifle designs, etc.), we found it darkly satisfying to learn that the first real copyright law was invented around 1662 not in order to protect the rights of *creators* in their own work, but rather as a means for *publishers* in England– working in cahoots with the crown, which wanted to suppress the distribution of dissident material– to monopolize their book*selling* business. The rights went to the publishers, not the writers, and, rather than rewarding creators, actually suppressed all unapproved writers' work. Eventually this first try at protection was discarded as a bad idea.

The 1709 Statute of Anne for the first time granted exclusive rights in books to the authors who wrote them, aiming to avert financial losses due to pirated printings specifically "for the Encouragement of Learned Men to compose and write useful Books". Captioned "An Act for the Encouragement of Learning," the statute granted this monopoly to authors for a limited time only, in recognition of the fact that to the extent that the books' duplication and circulation was limited, learning was in fact *dis*couraged. And this is the tension at the core of copyright in a free society: the need for creators to be adequately compensated vs. the societal imperative of free flow of information and the resulting progress of the culture.

With the formation of the U.S., protection of private intellectual property was again cast in terms of promoting a public good. The U.S. Constitution (1787) outlined the basis for our copyright law: "The Congress shall have power…[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries…". Note that the duration of copyrights are limited (whereas physical property rights are ordinarily perpetual), that the benefit afforded to the creator is expressed as consequent to the purpose (not central), and that Congress had to enact a law to create copyright (it wasn't seen as a natural, pre-existing right).

The idea expressed in the Constitution and later codified into a succession of copyright laws– culminating in the Copyright Act of 1976– is generally to grant the copyright holder a monopoly on the work as regards: reproduction of the work; preparing derivative works (*i.e.* translations, new musical arrangements, adaptation to other media, condensations, etc.); public distribution of copies via sale, rental, lease, or lending; for performable works, public performance; and for displayable works, public display. That list enumerates the maximum extent of the protection the law gives a copyright holder, as there are limitations for certain media. Copyright protects only "original works of authorship fixed in any tangible medium of expression," not facts, ideas, processes, physical inventions, slogans, short phrases, typographical design, or trademarks. Another important limitation is fair use, which describes how a particular use of a work may be found to be exempt from the copyright holder's monopoly.

Fair Use

"If copyright is a fence, then fair use is the gate."

–Negativland

The fair use principle, first established in an 1840 case over a biography of George Washington that was abridged from another, allows the reuse of otherwise copyright-protected material without permission or payment of fees of any kind under certain circumstances. It's a defense to a copyright infringement lawsuit that acknowledges that many kinds of reuse can promote cultural progress without harming the item's owner, and that those uses should be free (recall that the aim is to balance the private good against the public good, not to give copyright holders complete control over all possible aspects of a work). Just as copyright is limited, fair use allows only limited cultural reuses.

Negativland is a group that has been sued twice for copyright infringement over collage and parody works, and has recently devoted itself to advocating a reform of U.S. copyright laws.

Keyboard presents this article for our readers' information, not as legal advice. The issues discussed can be highly technical, and the "right" course of action could differ dramatically in apparrently similar situations. The author is not a lawyer, and anyone confronting the questions that this story addresses should consult a lawyer before acting.

The fair use principle first solidified into statue in the Copyright Act of 1976. The law is worded vaguely, partly because the kinds of use that might be fair are so numerous and diverse and that no complete formal expression of what definitely is and isn't fair use was thought to be possible. Instead, the law lays out certain 'factors' to be considered by a court to determine whether the particular use before the court is fair:

"§ 107. Limitations on exclusive rights: Fair use.

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include–

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors."

Note that, despite musician's folklore, there's nothing like 'up to 8 notes is OK' or 'up to 3 seconds is OK,' only very general rules. Because of the vagueness, judges and juries– usually unschooled in copyright history and eager to see bad eggs punished– have frequently ruled against defendants raising fair use. As an unfortunate result, the trend in lower courts has lately been to presume that any commercial use is an infringement. This has led to a general sense that all appropriation requires payment, leading in turn to a climate of belligerence toward even the *idea* of using a music sample without permission and payment, no matter the circumstance. The 2 Live Crew opinion has reminded us that this stance wrongly confuses limited intellectual property rights with more nearly absolute physical property rights, and in fact runs contrary to the purpose of copyright.

The 2 Live Crew Case

In 1990 Acuff-Rose Music, Inc., who control Roy Orbison's *Oh Pretty Woman*, sued Luke Skywalker (speaking of infringements...), his group 2 Live Crew, and their record company for copyright infringement over their parody rap version of the same song, called just *Pretty Woman*, on their then-quarter-million-selling album *As Clean As They Wanna Be* (1989). (The case is known as *Campbell v. Acuff-Rose* because the publisher sued using Skywalker's given name, Luther Campbell.) Musically, the track is based on the original song's bass line, and the lyrics are a rude and raunchy take-off that begins exactly the same as Orbison's version. The group had asked permission from Acuff-Rose at the time of the release, offering to pay for the use, but were turned down. They decided to put it out anyway.

2 Live Crew proved to the original court that as matters of law 1) their track was a parody of the older song, entitling them to claim fair use, 2) their appropriations were not excessive given *Pretty Woman*'s nature as a parody, and 3) the possibility of their record harming the original's market was remote in the extreme– and so won the case without having to go through a trial. Acuff-Rose appealed, arguing that 1) the fair use defense should have been denied to the group because their record was commercial in nature and therefore must be presumed unfair, and 2) "by taking the 'heart' of the original and making it the 'heart' of a new work, 2 Live Crew had, qualitatively, taken too much" of the song. Acuff-Rose won the appeal: the original decision was reversed and the case was remanded to the original court in Tennessee.

Frustrated with the Court of Appeals' conclusion, 2 Live Crew resorted to a petition asking the U.S. Supreme Court to decide the issue of whether it is possible for their song to be found a fair use despite its 'commercial nature.' The Supreme Court agreed to consider the matter, and so 2 Live Crew's trial was delayed pending the decision. Now the Supreme Court has held that *"2 Live Crew's commercial parody may be a fair use within the meaning of § 107,"* reversing the Court of Appeals' decision, and has remanded the case to the trial court for an evaluation of *Pretty Woman* under the new fair use criteria set forth in the same opinion.

"The fair use doctrine thus 'permits [and requires] courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

–Stewart v. Abend, 495 U. S. 207, 236 (1990) (Quoted in 2 Live Crew opinion)

The New Position On Fair Use

The Supreme Court took advantage of the opportunity of 2 Live Crew's petition to proclaim, not only on *Pretty Woman* specifically, but on the rules that govern the fair use defense generally. The Court elaborated on the first paragraph of Section 107, broadening what general types of uses may be found fair; on three of the four factors, clarifying how various aspects of a use may interact to tend to render it more fair or less fair; and on how to consider a particular use's composite showing under the four factors, calling for an interpretation of the factors as a multidimensional continuum rather than as a series of pass/fail tests all or most of which must be passed. In other words, it may be possible for poor showings on some factors to be balanced by better showings on other factors. Because this case involves a song parody and that pretty much defines its relation to the original, the decision says nothing new on the second factor, 'the nature of the copyrighted work'.

Although the new guidelines should find more uses fair than previously, this is not a liberal court, and the opinion is in an important sense *conservative*, shaking off precedents of overprotective case law and reaffirming the primeval intent of copyright law: to encourage the creation of new, progressive works, with a refreshing and healthy acceptance of the inescapable fact that everything new is built in large part on something old. Justice Souter is, however, careful to note that although parody obviously has to take from its object, there's still the question of how much is too much...and so litigated parodies, like all other alleged infringements raising the fair use defense, have to be evaluated along the four factors as they apply to the particular case.

To quote the opinion: *"[W]hile in the 'vast majority of cases...most infringements are simple piracy,' such cases are 'worlds apart from many of those raising reasonable contentions of fair use' where 'there may be a strong public interest in the publication of the secondary work...'...'[I]n truth, in literature, in science and in art, there are, and can be, few, if any, things, which in an abstract sense are strictly new and original throughout. Every book in literature, science and art, borrows, and must necessarily borrow, and use much that was well known and used before.'...[T]he statutory examples of permissible uses provide only general guidance. The four statutory factors are to be explored and weighed together in light of copyright's purpose of promoting science and the arts... The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."*

Factor 1: 'the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;'

The Court had the most to say about three possible aspects of an alleged infringement: its commerciality, the degree to which it transforms what was taken, and its effect of commenting on the source.

Crucially, in answering the primary question before it the Court determined that just because a use is commercial doesn't mean it can't be fair: *"The Court of Appeals...erred in giving virtually dispositive weight to the commercial nature of that parody"* by misinterpreting the decision in *Sony Corp. of America v. Universal Studios, Inc.*– the famous Betamax case that legalized home VCR taping of broadcast TV shows. *"If, indeed, commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'...Congress could not have intended such a rule..."* This position yields a side effect surprising to commonsense copyright notions: *"Accordingly, the mere fact that a use is educational and not for profit does not insulate it from a finding of infringement, any more than the commercial character of a use bars a finding of fairness."*

The opinion also endorsed a criterion of 'transformation,' which although not present in the statute has appeared sporadically in recent case law: *"...[T]he first...factor...focuses on whether the new work merely supersedes the*

objects of the original creation, or whether and to what extent it is 'transformative,' altering the original with new expression, meaning, or message. The more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use...The central purpose [of the first factor]*...is to see...whether the new work...adds something new, with a further purpose or different character...Although such transformative use is not absolutely necessary for a finding of fair use,...the goal of copyright...is generally furthered by the creation of transformative works....[P]arody has an obvious claim to transformative value..."* In a concurring opinion (which doesn't carry the force of law as does the majority opinion), Justice Kennedy alone warns against insubstantially transforming the material and then claiming fair use when you get sued– a version of an existing song performed in a different musical style, for example, ordinarily wouldn't count as a fair use because the transformation is too weak.

In line with a recent lower court decision in sculptor Jeff Koons' *String of Puppies* case (Koons' exact sculptural realization of a copyrighted photograph was found to be unfair due to lack of comment and original contribution despite his intention to comment on popular taste), the Court suggests that some form of comment on the original work itself– even a raunchy comment– may be required in order to justify any taking at all: *"If...the commentary has no critical bearing on the substance or style of the original composition, which the alleged infringer merely uses to get attention or to avoid the drudgery in working up something fresh, the claim to fairness in borrowing from another's work diminishes accordingly (if it does not vanish), and other factors, like the extent of its commerciality, loom larger....The threshold question when fair use is raised in a parody is whether a parodic character may reasonably be perceived. Whether, going beyond that, parody is in good taste or bad taste does not and should not matter to fair use."* This last departs from case law that has sometimes denied the fair use defense on the basis of raunchiness alone.

Justice Kennedy's seperate comment stresses the commentary link at length: *"It is not enough that the parody use the original in a humorous fashion, however creative that humor may be. The parody must target the original, and not just its general style, the genre of art to which it belongs, or society as a whole (although if it targets the original, it may target those features as well)... [C]ourts should not accord fair use protection to profiteers who do no more than add a few silly words to someone else's song..."*

However, Justice Souter, speaking on behalf of the Court, seems to find more categories potentially deserving of fair use than Justice Kennedy: *"A parody that more loosely targets an original...may still be sufficiently aimed at an original to come within our analysis of parody... [W]hen there is little or no risk of market substitution, whether because of the large extent of transformation of the earlier work, the new work's minimal distribution in the market, the small extent to which it borrows from an original, or other factors, taking parodic aim at an original is a less critical factor in the analysis, and looser forms of parody may be found to be fair use, as may satire with lesser justification for borrowing than would otherwise be required....Satire can stand on its own two feet and so requires justification for the very act of borrowing,"* implying that such justification in terms of the other factors is in fact possible. (Satire is defined here as a work 'in which prevalent follies or vices are assailed with ridicule' or 'attacked through irony, derision, or wit.')

The decision also holds that identification of a work as a parody isn't necessary to gain access to the fair use defense, you don't have to have a track record as a parodist to raise fair use, and having been turned down by a copyright holder doesn't reduce one's ability to claim fair use.

Factor 3: 'the amount and substantiality of the portion used in relation to the copyrighted work as a whole;'

This factor tends to interrelate with Factor 1 in light of the 'multidimensional continuum' nature of the four factors. Here the Court found that the Court of Appeals erred in holding that *Pretty Woman* copied excessively from Orbison, interpreting this factor to ask whether 'the amount and substantiality of the portion used' is excessive *specifically in relation to the parodic purpose.* This factor *"...calls for thought not only about the quantity of the materials used, but about their quality and importance, too...[W]hether 'a substantial portion of the infringing work was copied verbatim' from the copyrighted work is a relevant question...for it may reveal a dearth of transformative character or purpose under the first factor, or a greater likelihood of market harm under the fourth; a work composed primarily of an original, particularly its heart, with little added or changed, is more likely to be a merely superseding use, fulfilling demand for the original,"* and consequently unfair.

The Court acknowledged that parody by nature– depending on the audience's recognition of a work so that they'll 'get' the parody in the first place– requires more taking than most possibly allowable uses, including taking the most characteristic 'heart' of the original, and that this must be taken into account when considering a fair use defense for parody. However, their preference is still for minimal taking: *"Once enough has been taken to assure identification, how much more is reasonable will depend, say, on the extent to which the song's overriding purpose and character is to parody the original, or, in contrast, the likelihood that the parody may serve as a market substitute for the original...."* The court is serious about reserving this greater allowance to take for actual, creative parodies, but finds that *Pretty Woman* passes muster in this regard: *"...[I]n parody...context is everything, and the question of fairness asks what else the parodist did besides go to the heart of the original...*[2 Live Crew] *is not a case...where a 'substantial portion' of the parody itself is composed of a 'verbatim' copying of the original. It is not, that is, a case where the parody is so insubstantial, as compared to the copying,"* that it loses on this factor.

Factor 4: 'the effect of the use upon the potential market for or value of the copyrighted work'

This is the only part of fair use that considers loss of income to the original copyright holder, and tends to be interrelated with Factors 1 and 3. The clarification here significantly narrowed owners' potential financial objections to reuse, correcting the Court of Appeal's presumption on this point: *"No 'presumption' or inference of market harm...is applicable to a case that involves something beyond mere duplication for commercial purposes,"* i.e. piracy of whole works, noting *"...the importance of this factor will vary, not only with the amount of harm, but also with the relative strength of the showing on the other factors..."*

The Court found that although a parody can legitimately reduce sales of the original through ridicule, due to its nature a parody is unlikely to harm the original's market in terms of substitutive effect, and so will generally fare well under factor 4. Transformation is given another boost here: *"[W]hen...the second use is transformative, market substitution is at least less certain, and market harm may not be so readily inferred....We do not, of course, suggest that a parody may not harm the market at all, but when a lethal parody, like a scathing theatre review, kills demand for the original, it does not produce harm cognizable under the Copyright Act. Because 'parody may quite legitimately aim at garroting the original, destroying it commercially as well as artistically,'...the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement [, which] usurps it.'...As to parody pure and simple, it is unlikely that the work will act as a substitute for the original..."*

Factor 4 *"...requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and widespread conduct of the sort engaged in by the defendant...would result in a substantially adverse impact on the potential market' for the original..."* as well as for derivative works (a photograph of a painting is a derivative of the painting; a rendition of a song in a different style is a derivative of the original, etc.). Justice Souter notes that by not attempting to prove that their song, which in addition to being a parody also happens to be a rap version of *Oh Pretty Woman*, hasn't acted to supersede sales of a non-parody rap version by some hypothetical other artist, 2 Live Crew has left this question open.

In discussing the fourth factor Justice Souter notes: *"We express no opinion as to the derivative markets for works using elements of an original as vehicles for satire or amusement, making no comment on the original or criticism of it."* (Presumably this is in reference to untransformed elements.) Some attorneys think this is exactly the category into which the great majority of conventional music sampling falls, and that the point here is simply that this kind of use has to battle its way through the four-factor analysis like any other. In fair use both legislators and courts have always been reluctant to preemptively rule any category of use as wholly fair or unfair.

The Court's Answers to the Usual Objections to Sampling

In the frequently antagonistic debate over free sampling and other techniques of artistic appropriation, many opinions have been expressed as to exactly what it is that copyrights are here to do.

All sides have claimed to find basis for their positions in their personal moral convictions, but in the U.S. the code governing proscribed behavior and avenues for redress of grievance is not varying morality, but law– and when it comes to copyright, the law just changed. One way to look at the decision is to see how the new state of the law answers traditional objections to artistic appropriation and recent objections to suggestions on broadening fair use. A recent Commentary in *Billboard* magazine (March 5, 1994) served to collect those arguments, paraphrased here:

"To we who put in the time, energy, creative effort, and money necessary to create our music in the first place, the use of our work for commercial gain without payment or permission is intellectual and physical theft. Intellectual property is the same as physical property. You can't take my car without permission, and you can't take my creation without permission. In music, the 'right thing' is always for samplers to pay the people who own the property, i.e. the copyright holders. Extending fair use's allowances for free appropriation for parody, education, and commentary to some generalized 'artistic freedom' and 'free speech' interpretation is bizarre and would allow stealing for personal gain."

This argument erroneously elevates the individual's particular sense of right and wrong to the level of law, and absolutist stances of this kind are not in fact supported by American law– copyright is constitutional precisely *because* of the exceptions it allows under fair use. A copyright holder's rights have never depended upon the amount of resources it took to develop or acquire the work. In law, there are cases of fair use where neither permission nor payment are required (*"...If the use is otherwise fair, then no permission need be sought or granted..."*) and by definition a fair use is not an infringement. As to the appropriator profiting, this was the central point of contention in the 2 Live Crew case. The Court held that a commercial use *per se* does not make use of a copyright-protected work an unfair infringement. As to the Constitutional differences between physical and intellectual property, physical property rights are ordinarily eternal, whereas intellectual property rights are of limited duration and extent. These limits were set to balance cultural and scientific development against private control. As to charges of physical theft, well, the copyright holder still has the original after the sample is taken.

One sometimes hears this more direct objection: "I made this record, and I'll be *damned* if anybody else is gonna make any money off it!" Although understandable to a point, this shows an incomplete understanding of copyright's scope and purpose. Creation simply does not bring an absolute monopoly to control all aspects of a work. A fragmentary, non-competing, transformed, commentary use may be OK even if it's commercial.

How Would Particular Works Fare Under the New Rules?

Another way to examine the implications of the new rules is to see how particular appropriative works that have been removed from the world in the past might fare under the new rules.

Gilligan's Island (Stairway), by Little Roger and the Goosebumps (1978), a commercial 45 RPM single that got a lot of radio airplay around the country as a novelty item, was a pretty straight cover of *Stairway to Heaven*– except that the words and part of the tune came from the *Gilligan's Island* theme. It was crushed by attorneys for Led Zeppelin's organization and removed from the world. This was an unusual kind of parody, sort of a parody by juxtaposition. Although hilarious and unlikely to replace the original *Stairway* in any way, this record would probably have a hard time under the new rules because of the subtlety of its comment on the original, and the limited transformation of the music taken– Justice Souter might like it, but Justice Kennedy certainly wouldn't.

Plunderphonic, by John Oswald (1989), a CD given away for free but made up 100% of often dazzlingly inventive edits of popular and classical music recordings– many different tracks of it– was crushed by the Canadian equivalent of the RIAA and removed from the world (literally, the CDs were confiscated and crushed in a machine). There's no chance *Plunderphonic* would ever replace any of its originals; most of its takings were highly "transformative" via extreme editing; it was non-commercial; and most of its takings were brief. All of this helps, so *Plunderphonic* fares better than *Gilligan's Island (Stairway),* but whether the net is positive is arguable because some of the takings were lengthy, and, although some of us in the arts can see these pieces as commenting on the originals, unmusical courts might have a harder time.

How To Get the Full Text of the Opinions

The reference librarian at your local public library should be able to provide you with copies of the full text of these decisions. (The Supreme Court doesn't copyright its decisions.) *Fogerty v. Fantasy, Inc.* is case No. 92-1750, decided March 1, 1994, and the 2 Live Crew case, formally *Campbell, aka Skyywalker, et al. v. Acuff-Rose Music, Inc.*, is case No. 92-1292, decided March 7, 1994. Electronically, plain text file versions of these court decisions, as well as a list of pro-artist lawyers' groups in the U. S., are available on the Internet by anonymous FTP to **primus.com** in **/pub/negativland/decision** and **/pub/negativland/artlawyers**.

U2, by Negativland (1991), a vinyl/CD/cassette commercial release of two parody versions of U2's *I Still Haven't Found What I'm Looking For,* including outtakes of DJ Casey Kasem, was crushed and removed from the world by U2's record label and music publishing company. Although possible grounds existed under U.S. trademark law to object to the release's title and cover (large letter U and numeral 2), and to the celebrity tapes under 'right to publicity' law, the new fair use guidelines tend to legitimate the recording itself under copyright law. The parody included the original music and lyrics, both obviously transformed for comedic effect, a sample from the original recording, and tapes commenting on the record business in general and U2 in particular. There was no possible effect of substituting for the original U2 recording of the song (other than because of the cover, which could have been changed)– not least because of the record's limited distribution (7000 copies vs. U2's umpteen million). Ironically, the big "U2" on the cover that made the record vulnerable to trademark law might help demonstrate the commentary link to the original work favored by the new fair use rules, making it more legal rather than less.

Summary of the New, Interrelated Fair Use Rules

• *The less the new work replaces the original work in its own market*– or in its possible future markets– the more likely it is to be fair. This aspect is ordinarily given more weight than any other in order to discourage uses leading to actual loss to the copyright holder. Reduced distribution, extensive transformation of the taking, and lesser taking tend to lessen possible market replacement effects, and make a use more likely to be fair. A criticism of an original is ordinarily held to compete in a different market than the original, and so is less vulnerable on this point. There is no explicit maximum tolerable threshold for market harm.

• *The more the new work comments upon the original work,* the more likely it is to be fair, or the more leeway it may be afforded in the other areas (for example the more of it can probably be used). In commenting on the original, it can be extremely mean, even to the point of destroying the demand for the original work; but remember that it's possible in a work of art to violate laws other than copyright: celebrity names, images, and voices may be protected by right of privacy and right of publicity law; product names including band names and titles of works can be protected under trademark law; and slander and libel are still illegal. The new work needn't be an aesthetically *successful* commentary, so long as the intention to actually *be* some form of commentary is discernible. There is no explicit minimum required threshold for degree of commentary, but some on the Court would prefer to see the presence of some comment, even a minimal one, as a prerequisite for any fair use protection at all.

• *The less taken,* the more likely the use is fair ('less' including how central to the original work the taking is, not just the amount). The Court strongly discourages excessive taking, although there is no explicit maximum tolerable threshold for the amount taken– the more the nature of the new work requires taking (as in parody), the more likely a greater taking is to be found fair. But don't try calling something a parody when it isn't to try to justify excessive taking.

• *The more transformative* the use, the more likely the use is fair. 'Transformative' here means that the taking is changed either materially or in terms of its meaning– for example, by recontextualizing. I suppose we could say the more creative the use is, the more likely the use is fair. There is no explicit minimum required threshold for degree of transformation, but truncation alone is probably inadequate.

• *The less commercial* and/or less distributed the new work is, the more likely it is to be fair. Although there is no explicit maximum tolerable

threshold for commerciality, advertising uses are less likely to be found fair. However, a poor showing on the other factors can make even a completely non-commercial use unfair.

To simplify the whole thing to an almost dangerous point: Copyright law encourages creation itself. Taking from a copyright-protected work in order to create a new one can be OK as long as you don't damage the original by replacing it, you don't merely capitalize on the original, and you add something significant to what you take. If it's not something new, it's an infringement– but if you've really created something, you can raise the fair use defense.

Where the Court Could Have Gone Farther (An Opinion)

As we say, this is not a liberal Court. We're disappointed the Court didn't take this opportunity to reverse the unfortunate trend set in the Jeff Koons case and de-emphasize their position that a copyer's intention really ought to include commenting on the particular work copied. Dropping this criterion would have been consistent with the reaffirmation of copyright's fundamental purpose as promoting new works. There are plenty of perceptually and aesthetically interesting works to be made from taking existing material– even whole pieces– and creatively mutating them without necessarily imparting any particular effect of changing their 'meaning' or commenting *per se* on the original. Likewise, it's possible to construct collage works that make use of untransformed, individually unremarkable cultural objects to good effect. Such mutations and collages in no way replace the originals in their own or derivative markets.

The Court's position in this regard fails to recognize that a realm of aesthetic social value in terms of a work's perceptual effect or conceptual content may exist, perhaps not even particularly related to the material content– think of surrealism, for example. There's also no acknowledgment that artists have the job of trying to make sense of our world through their work, a world increasingly consisting of media objects, and that it's natural and positive that existing media's texture and even content have begun to appear in new works of art– even when only for evocative effect. When all these kinds of uses result in no loss to the copyright owner they too should have access to the fair use defense.

It's also unfortunate that Justice Kennedy wags a disapproving "Don't try this at home, kids!" finger at those who would try their hand at parody and other forms of creative appropriation in the wake of this decision when its apparent message is that there is now *more* room for creative fragmentary reuse of material, not less. At least the decision clarified that the four-factor test is a continuum, and uses are more likely to be found fair the more the reused item is transformed or supplanted by other material.

The Fogerty Decision on Attorney's Fees

The Supreme Court's March decision in *Fogerty vs. Fantasy* both follows the 2 Live Crew decision ideologically and reinforces it operationally. Interestingly, the *Fogerty* opinion resulted from songwriter John Fogerty being sued for copyright infringement for copying from himself. Fantasy claimed his 1985 song *Old Man Down the Road* infringed the music of his 1970 Creedence Clearwater Revival song *Run Through the Jungle*, which they control. Fogerty won and asked to be awarded his attorney's fees, as statute allows. Fantasy successfully argued that precedent in the Court of Appeals in Los Angeles allowed infringement defendants' attorney fees to be awarded only if the plaintiff had sued 'frivolously or in bad faith'. Prevailing plaintiffs, on the other hand, have almost automatically been awarded their attorney's fees.

Fogerty petitioned the Supreme Court to address this inequality, and won. The Supreme Court grounded its decision on the fact that, when it comes to promoting the 'public good' policy of the Copyright Act, it can be just as important for a defendant to defeat a copyright infringement suit as it can be for a plaintiff to prevail. The Court's new 'even-handed' standard, that the winner may at the discretion of the trial court be awarded attorney's fees whether plaintiff or defendant, now applies to all U.S. courts.

Analysis

It's been suggested that the Court agreed to examine these two cases in part to counter a recent tendency to see intellectual property rights as virtually permanent and unlimited monopolies, and perhaps in part to lessen the excessive copyright litigation clogging the courts– sensible, given the transition from industrialization to the information age. The legal community's reaction to the 2 Live Crew decision has been mixed, but some observers feel that the Court has struck a major blow for free speech and business growth in their eternal tension with intellectual property rights– some might say the dynamic of society has been given a boost over the preservation of wealth.

Some lawyers think copyright's monopoly has been clarified to exist only to the extent necessary to further the law's fundamental purpose, *i.e.* promoting the creation of new works– they see in the opinion a statement that the monopoly only arises as an instrument of that purpose, and that where copyright protections would work against that purpose the monopoly is to be restrained, *i.e.* by fair use. At the least, the Court has reminded us that our traditional, commonsense notion of an absolute copyright monopoly is flawed.

So now we must re-evaluate our positions.

We as artists can use the new guidelines in deciding when a detected or contemplated appropriation may be allowable under the law and, therefore, whether an infringement lawsuit is worth bringing, defending, or risking. Some lawyers imagine a short-term flurry of lawsuits as publishers of all kinds try to hem in the decision with more restrictive interpretations, but most conclude that a use that might pass under the new rules is now less likely to result in a lawsuit. As a result, the prevailing hostile climate toward reuse of material is likely to soften, if only grudgingly. We all have to admit that the new rules allow more than we used to think the old ones did.

For artists who appropriate, whether this amounts to good or bad news for you personally depends upon the kind of work you would like to do and how you release your work. If you're small and you like to take real short bits and process the bejesus out of 'em, you should still have no problems (keep it up!). If you're on a big label and you want to make records with recognizable samples from other pop records, or if you just really want to avoid any possibility of a lawsuit... well, you should consider letting your label's sampling clearance lawyers do their usual thing.

All us in-betweeners will have to think over the work we want to do in light of the new guidelines and decide on a case-by-case basis. Everyone who is doing– or would like to do– work involving appropriation should get a copy of the complete text of the opinion, study it carefully, and talk to a lawyer for advice if there's any doubt about particular things you want to do. (Many organizations offer free or cheap legal referrals for artists, such as California Lawyers for the Arts or Volunteer Lawyers for the Arts in New York.)

The question "Can I sample that?" has rarely had a simple answer. Copyright is still born with a work and automatically adheres to its creator. Making a work that includes any amount of another party's copyright-protected material without an arrangement with that party has always been to risk a lawsuit, and this broadening of fair use isn't necessarily going to keep you from being sued in the first place. If somebody's mad enough and rich enough to hire a lawyer they can still sue you no matter how fair you may think the use is.

Being sued is a truly awful and potentially bankrupting experience. But don't be cowed too easily: in many cases the risk is vanishingly small. An 'infringement' isn't an infringement until a court says it's an infringement, and now more kinds of appropriation have been made allowable. If you are sued over a truly fair sample and you can fight it off in court, the law gives you certain protections, including after *Fogerty* an increased likelihood of recovering your legal fees.

As for the other side, with the increased likelihood of being stuck with both sides' legal bills, angry copyright holders should think carefully before filing suit against an 'infringement' with possible fair use defenses under the new guidelines.

Conclusion

Maybe someday someone will take a fair use sampling case to the Supreme Court and we'll learn more about the rules as they apply to that particular situation, but until then the 2 Live Crew opinion is the best guidance we have. The good news for everybody– including the taxpaying public– is that the combination of *Fogerty* and the *Pretty Woman* case is likely to reduce the number of copyright infringement lawsuits generally. Closer to home, sampling suits (and threats of sampling suits) should lessen as artists work with the guidelines in mind and record companies pick their fights more carefully. *"And in the end..." There's a Whole New World* of ways to take little bits of old things, apply a little creativity, and wind up with something cool and new.

Negativland thanks Adam Belsky, Jeff Selman, Alan Korn, John Oswald, Roger Clark, and Dick Bright. And good luck, Luke!

The Economy of Ideas

A framework for rethinking patents and copyrights in the Digital Age

(Everything you know about intellectual property is wrong)

By John Perry Barlow

"If nature has made any one thing less susceptible than all others of exclusive property, it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone, and the receiver cannot dispossess himself of it. Its peculiar character, too, is that no one possesses the less, because every other possesses the whole of it. He who receives an idea from me, receives instruction himself without lessening mine; as he who lights his taper at mine, receives light without darkening me. That ideas should freely spread from one to another over the globe, for the moral and mutual instruction of man, and improvement of his condition, seems to have been peculiarly and benevolently designed by nature, when she made them, like fire, expansible over all space, without lessening their density at any point, and like the air in which we breathe, move, and have our physical being, incapable of confinement or exclusive appropriation. Inventions then cannot, in nature, be a subject of property."

–Thomas Jefferson

Throughout the time I've been groping around cyberspace, an immense, unsolved conundrum has remained at the root of nearly every legal, ethical, governmental, and social vexation to be found in the Virtual World. I refer to the problem of digitized property. The enigma is this: If our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it? How are we going to get paid for the work we do with our minds? And, if we can't get paid, what will assure the continued creation and distribution of such work?

Since we don't have a solution to what is a profoundly new kind of challenge, and are apparently unable to delay the galloping digitization of everything not obstinately physical, we are sailing into the future on a sinking ship.

This vessel, the accumulated canon of copyright and patent law, was developed to convey forms and methods of expression entirely different from the vaporous cargo it is now being asked to carry. It is leaking as much from within as from without.

Legal efforts to keep the old boat floating are taking three forms: a frenzy of deck chair rearrangement, stern warnings to the passengers that if she goes down, they will face harsh criminal penalties, and serene, glassy-eyed denial.

Intellectual property law cannot be patched, retrofitted, or expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum (which, in fact, rather resembles what is being attempted here). We will need to develop an entirely new set of methods as befits this entirely new set of circumstances.

Most of the people who actually create soft property - the programmers, hackers, and Net surfers - already know this. Unfortunately, neither the companies they work for nor the lawyers these companies hire have enough direct experience with nonmaterial goods to understand why they are so problematic. They are proceeding as though the old laws can somehow be made to work, either by grotesque expansion or by force. They are wrong.

The source of this conundrum is as simple as its solution is complex. Digital technology is detaching information from the physical plane, where property law of all sorts has always found definition.

Throughout the history of copyrights and patents, the proprietary assertions of thinkers have been focused not on their ideas but on the expression of those ideas. The ideas themselves, as well as facts about the phenomena of the world, were considered to be the collective property of humanity. One could claim franchise, in the case of copyright, on the precise turn of phrase used to convey a particular idea or the order in which facts were presented.

The point at which this franchise was imposed was that moment when the "word became flesh" by departing the mind of its originator and entering some physical object, whether book or widget. The subsequent arrival of other commercial media besides books didn't alter the legal importance of this moment. Law protected expression and, with few (and recent) exceptions, to express was to make physical.

Protecting physical expression had the force of convenience on its side. Copyright worked well because, Gutenberg notwithstanding, it was hard to make a book. Furthermore, books froze their contents into a condition which was as challenging to alter as it was to reproduce. Counterfeiting and distributing counterfeit volumes were obvious and visible activities - it was easy enough to catch somebody in the act of doing. Finally, unlike unbounded words or images, books had material surfaces to which one could attach copyright notices, publisher's marques, and price tags.

Mental-to-physical conversion was even more central to patent. A patent, until recently, was either a description of the form into which materials were to be rendered in the service of some purpose, or a description of the process by which rendition occurred. In either case, the conceptual heart of patent was the material result. If no purposeful object could be rendered because of some material limitation, the patent was rejected. Neither a Klein bottle nor a shovel made of silk could be patented. It had to be a thing, and the thing had to work.

Thus, the rights of invention and authorship adhered to activities in the physical world. One didn't get paid for ideas, but for the ability to deliver them into reality. For all practical purposes, the value was in the conveyance and not in the thought conveyed.

In other words, the bottle was protected, not the wine.

Now, as information enters cyberspace, the native home of Mind, these bottles are vanishing. With the advent of digitization, it is now possible to replace all previous information storage forms with one metabottle: complex and highly liquid patterns of ones and zeros.

Even the physical/digital bottles to which we've become accustomed - floppy disks, CD-ROMs, and other discrete, shrink-wrappable bit-packages - will disappear as all computers jack-in to the global Net. While the Internet may never include every CPU on the planet, it is more than doubling every year and can be expected to become the principal medium of information conveyance, and perhaps eventually, the only one.

Once that has happened, all the goods of the Information Age - all of the expressions once contained in books or film strips or newsletters - will exist either as pure thought or something very much like thought: voltage conditions darting around the Net at the speed of light, in conditions that one might behold in effect, as glowing pixels or transmitted sounds, but never touch or claim to "own" in the old sense of the word.

Some might argue that information will still require some physical manifestation, such as its magnetic existence on the titanic hard disks of distant servers, but these are bottles which have no macroscopically discrete or personally meaningful form.

Some will also argue that we have been dealing with unbottled expression since the advent of radio, and they would be right. But for most of the history of broadcast, there was no convenient way to capture soft goods from the electromagnetic ether and reproduce them with quality available in commercial packages. Only recently has this changed, and little has been done legally or technically to address the change.

Generally, the issue of consumer payment for broadcast products was irrelevant. The consumers themselves were the product. Broadcast media were supported either by the sale of the attention of their audience to advertisers, by government assessing payment through taxes, or by the whining mendicancy of annual donor drives.

All of the broadcast-support models are flawed. Support either by advertisers or government has almost invariably tainted the purity of the goods delivered. Besides, direct marketing is gradually killing the advertiser-support model anyway.

Broadcast media gave us another payment method for a virtual product: the royalties that broadcasters pay songwriters through such organizations as ASCAP and BMI. But, as a member of ASCAP, I can assure you this is not a model that we should emulate. The monitoring methods are wildly approximate. There is no parallel system of accounting in the revenue stream. It doesn't really work. Honest.

In any case, without our old methods, based on physically defining the expression of ideas, and in the absence of successful new models for nonphysical transaction, we simply don't know how to assure reliable payment for mental works. To make matters worse, this comes at a time when the human mind is replacing sunlight and mineral deposits as the principal source of new wealth.

Furthermore, the increasing difficulty of enforcing existing copyright and patent laws is already placing in peril the ultimate source of intellectual property - the free exchange of ideas.

That is, when the primary articles of commerce in a society look so much like speech as to be indistinguishable from it, and when the traditional methods of protecting their ownership have become ineffectual, attempting to fix the problem with broader and more vigorous enforcement will inevitably threaten freedom of speech. The greatest constraint on your future liberties may come not from government but from corporate legal departments laboring to protect by force what can no longer be protected by practical efficiency or general social consent.

Furthermore, when Jefferson and his fellow creatures of the Enlightenment designed the system that became American copyright law, their primary objective was assuring the widespread distribution of thought, not profit. Profit was the fuel that would carry ideas into the libraries and minds of their new republic. Libraries would purchase books, thus rewarding the authors for their work in assembling ideas; these ideas, otherwise "incapable of confinement," would then become freely available to the public. But what is the role of libraries in the absence of books? How does society now pay for the distribution of ideas if not by charging for the ideas themselves?

Additionally complicating the matter is the fact that along with the disappearance of the physical bottles in which intel-

lectual property protection has resided, digital technology is also erasing the legal jurisdictions of the physical world and replacing them with the unbounded and perhaps permanently lawless waves of cyberspace.

In cyberspace, no national or local boundaries contain the scene of a crime and determine the method of its prosecution; worse, no clear cultural agreements define what a crime might be. Unresolved and basic differences between Western and Asian cultural assumptions about intellectual property can only be exacerbated when many transactions are taking place in both hemispheres and yet, somehow, in neither.

Even in the most local of digital conditions, jurisdiction and responsibility are hard to assess. A group of music publishers filed suit against CompuServe this fall because it allowed its users to upload musical compositions into areas where other users might access them. But since CompuServe cannot practically exercise much control over the flood of bits that passes between its subscribers, it probably shouldn't be held responsible for unlawfully "publishing" these works.

Notions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at any time since the Sumerians first poked cuneiform into wet clay and called it stored grain. Only a very few people are aware of the enormity of this shift, and fewer of them are lawyers or public officials.

Those who do see these changes must prepare responses for the legal and social confusion that will erupt as efforts to protect new forms of property with old methods become more obviously futile, and, as a consequence, more adamant.

From Swords to Writs to Bits

Humanity now seems bent on creating a world economy primarily based on goods that take no material form. In doing so, we may be eliminating any predictable connection between creators and a fair reward for the utility or pleasure others may find in their works.

Without that connection, and without a fundamental change in consciousness to accommodate its loss, we are building our future on furor, litigation, and institutionalized evasion of payment except in response to raw force. We may return to the Bad Old Days of property.

Throughout the darker parts of human history, the possession and distribution of property was a largely military matter. "Ownership" was assured those with the nastiest tools, whether fists or armies, and the most resolute will to use them. Property was the divine right of thugs.

By the turn of the First Millennium AD, the emergence of merchant classes and landed gentry forced the development of ethical understandings for the resolution of property disputes. In the Middle Ages, enlightened rulers like England's Henry II began to codify this unwritten "common law" into recorded canons. These laws were local, which didn't matter much as they were primarily directed at real estate, a form of property that is local by definition. And, as the name implied, was very real.

This continued to be the case as long as the origin of wealth was agricultural, but with that dawning of the Industrial Revolution, humanity began to focus as much on means as ends. Tools acquired a new social value and, thanks to their development, it became possible to duplicate and distribute them in quantity.

To encourage their invention, copyright and patent law were developed in most Western countries. These laws were devoted to the delicate task of getting mental creations into the world where they could be used - and could enter the minds of others - while assuring their inventors compensation for the value of their use. And, as previously stated, the systems of both law and practice which grew up around that task were based on physical expression.

Since it is now possible to convey ideas from one mind to another without ever making them physical, we are now claiming to own ideas themselves and not merely their expression. And since it is likewise now possible to create useful tools that never take physical form, we have taken to patenting abstractions, sequences of virtual events, and mathematical formulae - the most unreal estate imaginable.

In certain areas, this leaves rights of ownership in such an ambiguous condition that property again adheres to those who can muster the largest armies. The only difference is that this time the armies consist of lawyers.

Threatening their opponents with the endless purgatory of litigation, over which some might prefer death itself, they assert claim to any thought which might have entered another cranium within the collective body of the corporations they serve. They act as though these ideas appeared in splendid detachment from all previous human thought. And they pretend that thinking about a product is somehow as good as manufacturing, distributing, and selling it.

What was previously considered a common human resource, distributed among the minds and libraries of the world, as well as the phenomena of nature herself, is now being fenced and deeded. It is as though a new class of enterprise had arisen that claimed to own the air.

What is to be done? While there is a certain grim fun to be had in it, dancing on the grave of copyright and patent will solve little, especially when so few are willing to admit that the occupant of this grave is even deceased, and so many are trying to uphold by force what can no longer be upheld by popular consent.

The legalists, desperate over their slipping grip, are vigorously trying to extend their reach. Indeed, the United States and other proponents of GATT are making adherence to our moribund systems of intellectual property protection a condition of membership in the marketplace of nations. For example, China will be denied Most Favored Nation trading status unless they agree to uphold a set of culturally alien principles that are no longer even sensibly applicable in their country of origin.

In a more perfect world, we'd be wise to declare a morato-

rium on litigation, legislation, and international treaties in this area until we had a clearer sense of the terms and conditions of enterprise in cyberspace. Ideally, laws ratify already developed social consensus. They are less the Social Contract itself than a series of memoranda expressing a collective intent that has emerged out of many millions of human interactions.

Humans have not inhabited cyberspace long enough or in sufficient diversity to have developed a Social Contract which conforms to the strange new conditions of that world. Laws developed prior to consensus usually favor the already established few who can get them passed and not society as a whole.

To the extent that law and established social practice exists in this area, they are already in dangerous disagreement. The laws regarding unlicensed reproduction of commercial software are clear and stern...and rarely observed. Software piracy laws are so practically unenforceable and breaking them has become so socially acceptable that only a thin minority appears compelled, either by fear or conscience, to obey them. When I give speeches on this subject, I always ask how many people in the audience can honestly claim to have no unauthorized software on their hard disks. I've never seen more than 10 percent of the hands go up.

Whenever there is such profound divergence between law and social practice, it is not society that adapts. Against the swift tide of custom, the software publishers' current practice of hanging a few visible scapegoats is so obviously capricious as to only further diminish respect for the law.

Part of the widespread disregard for commercial software copyrights stems from a legislative failure to understand the conditions into which it was inserted. To assume that systems of law based in the physical world will serve in an environment as fundamentally different as cyberspace is a folly for which everyone doing business in the future will pay.

Unbounded intellectual property is very different from physical property and can no longer be protected as though these differences did not exist. For example, if we continue to assume that value is based on scarcity, as it is with regard to physical objects, we will create laws that are precisely contrary to the nature of information, which may, in many cases, increase in value with distribution.

The large, legally risk-averse institutions most likely to play by the old rules will suffer for their compliance. As more lawyers, guns, and money are invested in either protecting their rights or subverting those of their opponents, their ability to produce new technology will simply grind to a halt as every move they make drives them deeper into a tar pit of courtroom warfare.

Faith in law will not be an effective strategy for high-tech companies. Law adapts by continuous increments and at a pace second only to geology. Technology advances in lunging jerks, like the punctuation of biological evolution grotesquely accelerated. Real-world conditions will continue to change at a blinding pace, and the law will lag further behind, more profoundly confused. This mismatch may prove impossible to overcome.

Promising economies based on purely digital products will either be born in a state of paralysis, as appears to be the case with multimedia, or continue in a brave and willful refusal by their owners to play the ownership game at all.

In the United States one can already see a parallel economy developing, mostly among small, fast moving enterprises who protect their ideas by getting into the marketplace quicker then their larger competitors who base their protection on fear and litigation.

Perhaps those who are part of the problem will simply quarantine themselves in court, while those who are part of the solution will create a new society based, at first, on piracy and freebooting. It may well be that when the current system of intellectual property law has collapsed, as seems inevitable, that no new legal structure will arise in its place.

But something will happen. After all, people do business. When a currency becomes meaningless, business is done in barter. When societies develop outside the law, they develop their own unwritten codes, practices, and ethical systems. While technology may undo law, technology offers methods for restoring creative rights.

* * * * *

An Economy of Verbs

The future forms and protections of intellectual property are densely obscured at this entrance to the Virtual Age. Nevertheless, I can make (or reiterate) a few flat statements that I earnestly believe won't look too silly in 50 years.

- **In the absence of the old containers, almost everything we think we know about intellectual property is wrong. We're going to have to unlearn it. We're going to have to look at information as though we'd never seen the stuff before.**
- **The protections that we will develop will rely far more on ethics and technology than on law.**
- **Encryption will be the technical basis for most intellectual property protection. (And should, for many reasons, be made more widely available.)**
- **The economy of the future will be based on relationship rather than possession. It will be continuous rather than sequential.**
- **And finally, in the years to come, most human exchange will be virtual rather than physical, consisting not of stuff but the stuff of which dreams are made. Our future business will be conducted in a world made more of verbs than nouns.**

John Perry Barlow (barlow@eff.org) is a retired cattle rancher, a lyricist for the Grateful Dead, and co-founder and executive chair of the Electronic Frontier Foundation.

***The Economy of Ideas** originally ran in **Wired** magazine.*

L. Negativland's Tenets of Free Appropriation

➳ FREE APPROPRIATION IS INEVITABLE when a population bombarded with electronic media meets the hardware that encourages them to capture it.

➳ AS ARTISTS, our work involves displacing and displaying bites of publicly available, publicly influential material because it peppers our personal environment and affects our consciousness. In our society, the media which surrounds us is as available, and as valid a subject for art, as nature itself.

➳ AS ARTISTS, the economic prohibition of clearance fees and the operational prohibition of not being able to obtain permission when our new context is unflattering to our samples should not diminish our ability to reference and reflect the media world around us.

➳ OUR APPROPRIATIONS are multiple and fragmentary in nature; they do not include whole works.

➳ OUR WORK is an authentic and original "whole," being much more than the sum of its samples. This is not a form of "bootlegging" intending to profit from the commercial potential of the subjects appropriated. The law must come to terms with distinguishing the difference between economic intent and artistic intent.

➳ THERE IS NO DEMONSTRABLE NEGATIVE effect on the market value of the original works from which we appropriate, or the cultural status or incomes of the artists who made the original works. Referencing a work in a fragmentary way is at least as likely to have a positive effect on these areas of concern. (Rap/Hip Hop sampling played a big part in the renewal of James Brown's career, and he sued them for it!)

➳ THE URGE TO MAKE one thing out of other things is an entirely traditional, socially healthy, and artistically valid impulse which has only recently been criminalized in order to force private tolls on the practice (or prohibit it to escape embarrassment). These now all-encompassing private locks on mass media have led to a mass culture that is almost completely "professional," formularized, and practically immune to any form of bottom-up, direct-reference criticism it doesn't approve of.

➳ THE COURTS' often-espoused principle that "If it's done for profit, it can't be fair use" represents a thoughtless and carelessly misguided prejudice against the struggle of new art to survive. Making media– any media– is expensive. It requires substantial up-front investments in time and manufactured goods to create, duplicate, and distribute anything. The courts' easy reliance on a not-for-profit standard for fair use ignores the reality that artists, no matter what they choose to do, need to support themselves and their work with a return on their investment just like everyone else. The currently applied 'non-profit only' standard simply assures that only the independently wealthy may dabble in fair use. If society values the challenging and reforming aspects of critical, fair use works that bubble up from independent, grassroots thinking, the law should not condone the smothering of such works by disallowing their economic survival in our "free" marketplace.

➳ WE BELIEVE that artistic freedom for all is more important to the health of society than the supplemental and extraneous incomes derived from private copyright tariffs which create a cultural climate of art control and Art Police. No matter how valid the original intent of our copyright laws may have been, they are now clearly being subverted when they are used to censor resented works, to suppress the public need to reuse and reshape information, and to garner purely opportunistic incomes from any public use of previously released cultural material which is, in fact, already publicly available to everyone. The U.S. Constitution clearly shows that the original intent of copyright law was to promote a public good, not a private one. No one should be allowed to claim a private control over the creative process itself. This struggle is essentially one of art against business, and ultimately about which one must make way for the other.

SP Chron 7/25/94
P. E10

Flash

Luther Campbell of 2 Live Crew is starting a girlie magazine, Scandalous, to feature "tastefully shot" multiracial nudes. Editor **Florence Anthony** also promises interviews with **Louis Farrakhan, Tori Braxton** and **Roger Clinton.**

"Luther wants to be the black **Hugh Hefner**," she told Newsweek.

APPENDIX 2
SUPPORTING DOCUMENTS

A. Contract Between SST Records and Negativland for the *U2* Single 255
B. Industry-Standard Record Contract Indemnity Clauses 258
C. Transcript of *U2/Negativland* Single 261

A. Contract Between SST Records and Negativland for the *U2* Single

RECORD CONTRACT

This agreement is made on September 10, 1990, by and between Negativland, hereinafter referred to as the Artist, and SST Records, P.O. Box 1, Lawndale, CA 90260. It is agreed between us as follows:

1. SST Records hereby agrees to advance the said Artist monies and/or finance the recording, manufacture, and promotion of the project known as Still Haven't Found What I'm Looking For E.P.. The project is to consist of material agreed upon by the Artist and SST. Attached is a schedule of chargebacks and advances for the said project.

2. For the rights herein granted and for the services to be rendered hereunder by you, SST Records shall pay the Artist royalty of twelve (12%) percent of 100% of the suggested retail price on records sold.

3. In the event that any of the performances hereunder are released together with or in combination with other performances or recordings it is agreed that as to such record you shall receive that proportion of the royalties payable to you as provided hereinbefore as the number of selections included in such record which are performances recorded hereunder bears to the total number of selections embodied in such record.

4. SST Records has the right to license or release the master recordings in other countries outside of the United States. One-half of the aforesaid royalty rate will apply on records sold in other countries. Royalties for records sold outside of the United States of America are to be computed in the national currency of the country where the retail list prices are above mentioned apply, and are to be payable only with respect to records for which SST Records receives payment in the United States, in dollar equivalent at the rate of exchange at the time SST Records receives payment in the United States, and after proportionate deductions for income and remittance taxes withheld at the source.

5. No royalties shall be payable hereunder with respect to records given for promotional purposes to disc jockeys, radio stations, press, distributors, dealers, et cetera.

6. No royalties shall be payable hereunder on portions of the master recording released as part of a compilation album with other artists released for promotional purposes at a low price on a non-profit basis.

000116

7. All recording costs, chargebacks, and/or advances shall be deducted from first royalties.

8. SST Records and our designees shall have the exclusive worldwide right in perpetuity from the date hereof to manufacture, distribute, and advertise records or other reproductions embodying the master recordings.

9. SST Records shall have the right to use the Artist's name, likeness, and biographical material for promotional purposes.

10. The Artist warrants and represents that he is under no disability, restriction, or prohibition, whether contractual or otherwise, to execute and perform this contract. Artist agrees to and do indemnify, save and hold SST Records harmless from any and all loss and damage (including attorney's fee) arising out of or connected with any claim by a third party which is inconsistent with any of the warranties or agreements made by the Artist in this contract.

11. The term "records" shall include all forms of recordings including, without limitation, discs of any speed or size, pre-recorded devices now known or which may hereafter become known.

12. All notices and payments shall be given to the addresses designated by the proper party and be in writing.

13. A statement of account and payment of royalties shall be made within ninety (90) days after December 31 and June 30 of each year. All royalty statements, and all other accounts rendered by us to you, shall be binding upon you and not subject to any objection by you for any reason unless specific objection in writing, stating the basis thereof, is given to us within one (1) year from the date rendered. SST Records is obligated for records paid for and not subject to return. The said statement shall be based on accrued royalties. A reserve will be applicable for records not paid for and subject to return. The said reserve will be liquidated on the next statement.

14. Artist shall have the right, upon the giving of at least thirty (30) days notice, to inspect books and records of SST Records, insofar as the same concerns Artist, at Artist's expense, at reasonable times during normal business hours, for the purpose of verifying the accuracy of any royalty statement rendered to Artist hereunder.

15. All compositions written or composed by the Artist and recorded hereunder shall be licensed to SST Records at our election and the mechanical royalties shall be paid out of a total amount of $ 0.066 earned per unit sold. Mechanical royalties to be paid other writers for cover versions of their songs will be withheld by SST Records and paid to said writer's publisher in the amount of the industry standard.

THIS IS A cover; IT'S USUALLY 0.33

16. SST Records may at our election assign this contract or any rights hereunder belonging to SST Records.

17. This contract sets forth the entire agreement between us with respect to the subject matter hereof. No modification, amendment, waiver, termination or discharge of this contract or any provision hereof shall be binding upon us unless confirmed by a written instrument signed by a partner of SST Records. No waiver of any provision of this contract or of any default hereunder shall affect our rights thereafter to enforce such provision or to exercise any right of remedy in the event of any other default, whether or not similar.

18. This contract shall be deemed to have been made in the State of California, and its validity, construction and effect shall be governed by the laws of the State of California.

SIGNED:

For Artist

Artist Name

Address

State, Zip

For SST Records
P.O. Box 1, Lawndale, CA 90260

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000118

• (a) Artist is authorized, empowered and able to enter into and fully perform its obligations under this agreement. Neither this agreement nor the fulfillment thereof by any party infringes on the right of any Person. Artist owns and controls, without any limitations, restrictions or encumbrances whatsoever, all rights granted or purported to be granted to Company hereunder, and Artist has obtained all necessary licenses and permissions as may be required for the full and unlimited exercise and enjoyment by Company of all of the rights granted and purported to be granted to Company herein. Company will own, possess and enjoy such rights without any hindrance on the part of any Person, firm or entity whatsoever.

(b) Artist has no knowledge of any claim or purported claim which would interfere with Company's rights hereunder or create any liability on the part of Company.

• Neither Master Recordings hereunder nor the performances embodied thereon, nor any other Materials, as hereinafter defined, nor any use thereof by Company or its grantees, licensees or assigns will violate or infringe upon the rights of any third party. "Materials," as used in this paragraph, means: Artwork, all Controlled Compositions; each name or sobriquet used by Artist, individually or as a group; and all other musical, dramatic, artistic and literary materials, ideas, and other intellectual properties furnished or selected by Artist or any producer and contained in or used in connection with any Recordings made hereunder or the packaging, sale, distribution, advertising, publicizing or other exploitation thereof.

• Neither any name(s) utilized by Artist, the Masters, any of the selections embodied therein, any other matters or materials supplied by Producer or Artist hereunder, nor any exploitation or use of any of the foregoing, shall violate or infringe upon any civil, personal, or proprietary rights of any person, including, without limitation, trademarks, trade names, copyrights, and rights of privacy and publicity.

• Producer and Artist agree to use their good faith efforts to record and produce commercially acceptable Masters hereunder.

• Artist agrees to and does hereby indemnify, save and hold Company harmless of and from any and all liability, loss, damage, cost or expense (including reasonable attorneys' fees) arising out of or connected with any breach or alleged breach of this agreement or any claim which is inconsistent with any of the warranties or representations made by Artist in this agreement, provided the said claim has been settled with Artist's consent, not to be unreasonably withheld, or has been reduced to final judgement, and agrees to reimburse Company on demand for any payment made or incurred by Company with respect to any liability or claim to which the foregoing indemnity applies. Notwithstanding anything to the contrary contained herein, Company shall have the right to settle without Artist's consent any claim involving sums of Five Thousand Dollars ($5,000) or less, and this indemnity shall apply in full to any claim so settled; if Artist does not consent to any settlement proposal by Company for an amount in excess of Five Thousand Dollars ($5,000), Company shall have the right to settle such claim without Artist's consent, and this indemnity shall apply in full to any claim so settled, unless Artist obtains a surety bond from a surety acceptable to Company in its sole discretion, with Company as a beneficiary, assuring Company of prompt payment of all expenses, losses, and damages (including attorneys' fees) which Company may incur as a result of said claim. Pending final determination of any claim involving such alleged breach or failure, Company may withhold sums due Artist hereunder in an amount reasonably consistent with the amount of such claim, unless Artist obtains a surety bond from a surety acceptable to Company in its sole discretion, with Company as a beneficiary, in an amount reasonably consistent with the amount of such claim. If no action is filed within two (2) years following the date on which such claim was first received by Company, Company shall release all sums withheld in connection with such claim, unless Company, in its reasonable business judgement, believes an action will be filed. Notwithstanding the foregoing, if after such release by Company of sums withheld in connection with a particular claim, such claim is reasserted, then Company's rights under this paragraph will apply ab initio in full force and effect. Company will give Artist prompt notice of any lawsuit instituted with respect to such a claim, and Artist shall have the right to participate in the defense thereof with counsel of Artist's choice and at Artist's expense provided, however, that Company shall have the right at all times to maintain control of the conduct of the defense.


U2
NEGATIVLAND
I Still Haven't Found
What I'm Looking For
(Clayton, Evans, Hewson, Mullen Jr.)
Published by Chappel Music/U2 (ASCAP)
1991 A Cappella Mix (7:15)
© 1991 Seeland MediaMedia (BMI)
℗ 1991 SST Records
Box 1, Lawndale CA 90260
Side One
45 RPM
SST 272


U2
NEGATIVLAND
I Still Haven't Found
What I'm Looking For
(Clayton, Evans, Hewson, Mullen Jr.)
Published by Chappel Music/U2 (ASCAP)
Special Edit Radio Mix (5:46)
© 1991 Seeland MediaMedia (BMI)
℗ 1991 SST Records
Box 1, Lawndale CA 90260
Side Two
45 RPM
SST 272

C. Transcript of *U2/Negativland* Single

LEGEND

A1, A2:	*Jack Armstrong (old radio series)*
B:	Bono
C:	**Casey Kasem**
CB1, CB2, CB3:	**CB and Ham radio transmissions**
CBJ:	***CB radio jammer***
D:	Don
CL:	Cyndi Lauper (Presenter, MTV Rock Video Awards)
MTVA:	*Announcer (MTV Rock Video Awards)*
UMTV:	Unidentified presenter (MTV Rock Video Awards)
S:	**COVEN (A BAND)**
V1-V5:	Various unidentified individuals
W:	**Weatherman**
WCB:	*Weatherman on CB radio*

Track 1: *1991 A Cappella Mix*

[To the tune of "I Still Haven't Found What I'm Looking For."]

CB1: Reproduction or what?

CB2: What did you say?

CB1: What *kind* of production?

CB2: There are all sorts of possibilities... You could do, you know, a little spoof on something...

V1: This is also nothing new...

CB1: Yeah, get some stuff together, no problem, y'know, depends on what you do...

A1 (Jack Armstrong): C'mon, let's look...

V2: Journey?

W (Weatherman): Ha Ha Ha, Ho... Oh, well...

V3: No, No, No, Uh uh.

C (Casey Kasem): This is American Top 40...

W: I have climbed the highest mountains...

CB2: Uh, I believe that's the Weatherman there...

W: And guess what?

CB1: Where ya at?

W: I have run... through the fields, only to be with you... Yup, with you... no one else, just you...

C: Here's the first top 40 hit...

W: And guess what?

C: ...for the Irish band from Dublin who call themselves U2...

W: I have run, I have crawled, I have scaled these city walls... Yeah, that's really great, I can't believe I did it, but nevertheless, I *have* done that for you...

C: That's the letter U and the numeral 2...

W: Only to be with you I've done all these things.

C: The f...

W: Yeah, with you, the fat one, that's it...

C: The f...

W: You're the fat one, and I wanna be with you...

A1: What's the matter?

C: Can I say, why was it changed here?

W: But, on the other hand, I still haven't found what I'm looking for.

C: That's the letter U and the numeral 2.

V3: Maybe they'll make it as a junior U2.

W: But, on the other hand, I still haven't found what I'm looking for.

C: That's the letter U and the numeral...

V3: They say...

W: Nope, definitely not.

C: ...two.

W: I haven't found it.

V3: They say they're kinda like U2.

W: I just can't seem to find it.

C: That's the letter U and the numeral 2.

W: Nope, definitely not, I haven't found it.

C: That's the letter U and the numeral 2.

A1: C'mon...

W: And here's what else I've done...

A1: C'mon, let's see what we can find.

W: I have kissed honey lips, felt the healing in her fingertips. I've even done that.

C: That's the letter U and the numeral 2.

W: While I was doing that– y'know, all the kissing on the honey lips?– It burned like fire, and it reminded me of cheap, melting plastic– the kind that makes little clouds of white vapo-gas, and then when it catches on fire, it makes those little... little strings of black smoke with little ashes attached to them. *That's* how it was kissing honey lips.

C: Why are we doing it?
Why have we
changed something?

W: And I still haven't found it...

B (Bono): Uh...

W: What I'm *looking* for, that is.
(fading) I just don't know
where the hell it is.
I just can't seem to find it...

B: Uh, the last thing we wanted to do was sound like anybody else. So with U2...

C: That's the letter U
and the numeral 2

B: ...you've gotta *challenge* it, you know, *musically* speaking. You know, you've gotta find *new* sounds on the guitar, you've gotta find a *new* way of approaching a 4/4 beat. You know, rock & roll still needs innovation... you know... and there's a lot... there's a...

there's a lot out there.

V4: Someone has said, "Get a great idea, a great purpose, marry it, and raise a family."

C: What the hell's going on here?

V5: Bono.

A2: Why, Billy, look!

C: See, I should be saying,
"American Top 40 is heard
in the 50 states and around the..."

V4: Are you two married to a great idea?

C: It was... It was every week,
"American Top 40 is heard in the..."

A2: Everything is topsy-turvy!

A1: I'll say it is!

C: Is it to just screw up things?

V4: Marriage is not you two living for each other.

C: 'Cause I can't say this...y'know...

A1: Let's see what we can find.

A2: Everything is such a mess!

C: Jeez, I thought we were
almost finished...

V4: It is you two uniting to live as a team for this great purpose.

A1: What's the matter?
Find something?

A2: No.

CBJ (CB Jammer): (unintelligible)
...fuck his ass... go jerk his bone!

A2: No, I can't find anything here...

WCB (Weatherman on CB): That damn sewer-mouth is back again.

A2: There's no one in here now...

CBJ: (unintelligible)

A2: There's nothing but Uncle Jim's short wave radio set.

[Phone Rings]

C: Ponderous!
Is Don on the phone?

D (Don): Hi, Casey. Uh, had 'em put me right on the speakerphone for ya... Uh, now... I just got word from Mr. Friday that, uh... uh, we *can't pay* you anything for this until, uh, our label sends us some of the money they owe us... so this will, uh, have to be *benefit terms*... so, uh...

C: Good golly Miss Molly!

D: Well, I gotta catch a plane. Give my regards to the Weatherman and, uh, heh, You Too!

C: Y'know, they do this to me
all the time... I dunno what the hell
they do it for, but...

CB: Yeah, that... the guy that was talkin' to the sewer-mouth there, bring 'im back.

C: Now, make it– and I also
want to know what happened
to the pictures I was supposed to
see this week?

WCB: Hey, sewer-mouth.

CBJ: Could be...
Hey, I'm on a frequency,
bet ya can't find me.

CB: He's got the sideband out, there?

C: That's the letter 2
and the numeral U.

W: Nyeh, ha, ha, *haa*...
I was a worm in the night...

CB: (unintelligible)

W: ...and cold as a stone I was.

C: Alright, alright...
OK let's try it, OK?

UMTV (MTV Rock Video Awards presenter): Cyndi?

CL (Cyndi Lauper): OK...

W: And I believe in kingdom come...

CL: OK...

W: And all the colors bleeding into one big mess.

CL: OK...

W: I'll probably have to get out the S.T.P. cleaner on that one, maybe the 409, but I'm not sure yet.

CL: Uh...

C: That's the letter U
and the numeral 2.

UMTV: I have the envelope here...

W: And you broke the bonds,

CL: And uh...

W: You broke the goddamn bonds...

CL: And uh...

W: You loosened the chains...

UMTV: I have the envelope...

W: You've carried a cross...

UMTV: I have the envelope here...

W: And my shame, and my shame...
Shame, shame, shame,
shame, shame...

CL: And uh...

W: So much shame, yeah.
Ha, ha, hoo, *hoo,*
hee, ha, haaa.

CL: And uh...I'm a little nearsighted.

C: Why have we changed something that we've been doing all along?

W: Y'know, I believe it.

C: Alright...

W: No, I guess I *don't* believe it...
I don't know what
I'm talking about...

C: This is, this is blowin'...y'know...

W: But, nevertheless,
I *still haven't found it.*

C: That's the letter U...

W: I haven't found
what I'm looking for,
I haven't found it...

C: I can't say it again!

W: I'm *lookin'* for it,
but I don't even
know where it is.

C: ...and the numeral 2.

W: I don't even really know...

CL: Before we announce the winner...

W: ...anything anymore,
I just...

C: See, that doesn't sound right, either.

W: ...I don't really know
what to do...

CL: Let's just...

C: Alright...

CL: Let's just...

W: ...Or do I?

CL: ...recap...

C: OK, let's try it, OK?

CL: ...the nominees.

W: But I still haven't found it.

C: That's the letter U and the numeral 2.

W: That doesn't make sense:
"But I still haven't found it,
I'm looking..."

UMTV: I have the envelope here...

W: "I'm...", no,
"*I'm*, I'm looking for it..."

UMTV: I have the envelope here...

W: No, just:
"I'm - looking -
for - it."

UMTV: I have the envelope...

C: That's the letter U and the numeral 2.

W: And...I...

CBJ: There ain't nobody can find me on this frequency.

W: Ha, ha, ha, ha...

MTVA (MTV Rock Video Awards announcer): U2, U2, U2, U2.

W: I just don't know much
of anything. Maybe I
oughta be shot point
blank in the stamper
tonight.

C: That's the letter U and the numeral 2.

CBJ: Hey, c'mon, find me... you can't find me?...

C: Is that the way I say that? I dunno how to say it.

MTVA: U2, I Still Haven't Found What I'm Looking For.

W: Well, I'll be jiggered.
There it is.

C: "We're counting down the 40 biggest hits in the 50 states."

WCB: Hey sewer-mouth, we're gonna getcha.

C: "This is American Top 40..." "This is American Top 40, heard..." ...God, I hate that. We come outta that, and then I gotta say the goddamn Ameri...

CL: And uh...

C: I hear the American Top 40 jingle and then I say, "This is American Top For..."

CL: And uh, the winner is...

C: Let the goddamn jingle I.D. this show. I I.D. the show whenever there isn't a jingle, don't I?!

CL: The winner is...

C: Don't I do it between every goddamn record that we play?!!

CL: ...*INXS!* *(in excess)*

[End of Track 1]

Track 2: *Special Edit Radio Mix*

[To the tune of "I Still Haven't Found What I'm Looking For."]

C: "Now, we're up to our long distance dedication, and this one is about kids, and pets, and a situation we can all understand, weather we have kids, or pets, or neither. It's from a man in Cincinnati, Ohio, and here's what he writes:

"'Dear Casey, this may seem to be a strange dedication request, but I'm quite sincere, and it will mean a lot if you play it. Recently there was a death in our family. He was a little dog named Snuggles. But he was most certainly a part of...'"

Let's co... Let's start again... from, comin' out of the record... Play the record, OK?...

Please...

CBJ: You can't get on the frequency that I'm on, ya dumb son-of-a-bitch.

C: "That's the letter U and the numeral 2. The 4-man band features Adam Clayton on bass, Larry Mullen on drums, Dave Evans, nicknamed 'The Edge,' on..." ...This is bullshit, nobody cares... these guys are from England and who gives a shit?!

CBJ: Oh, yeah...

C: It's a lot of wasted names that don't mean diddly shit!

CBJ: I.... Fer sure, fer sure, you guys don't know where he's at, you don't know shit about him...

C: This is bullshit, this is bullshit...

CB1: Sounds like he's portable, too.

C: Who gives a shit, who gives a shit.

WCB: Yeah, it is close.

C: Diddly shit, diddly shit, diddly shit, diddly shit.

CBJ: Yeah...

WCB: Damn right.

C: Nobody cares!

WCB: It's been gettin' stronger all the time here...

C: Snuggles.

CBJ: Yeah...

C: Snuggles.

CBJ: Oh, yeah...

C: Snuggles.

CBJ: Oh, yeah, OK...

C: He was a little dog, named Snuggles.

[Dog Barking]

C: This is American Top 40. This is American Top 40. This is bullshit, bullshit, bullshit.

CBJ: Ahhh, ya can't get ahold of me ya little fuckin' twerp cocksucker... [whistle] Fuck you!

CB2: So when we find ya, we want your blood.

CBJ: Here we go with the shit "Tryin' to find 'im" again, "Oh, when we find 'em..." You goddam haven't found, you couldn't find your fuckin' asshole if your fuckin butt wasn't connected to it... Buncha fuckin' white-ass honkeys, man, ya can't find shit, stupid bastards.

CB2: I wanna meet you... Definitely, I don't think you got the fuckin' balls...

CBJ: You haven't found anybody, anywhere, anytime. You never have given out his correct address, his fuckin' right-on description, or a car, or nothin', you got some fuckin' bullshit info... Ha, you haven't done shit with 'im.

CB1: We didn't find you yet? We really didn't find you the first time?

CBJ: When was the first time, huh? When was the first time? Hey, why don't ya give out his, his address, an' what he looks like, an' his car an', an' all that fuckin' information. God Damn, you got somebody there, I dunno who, but go ahead and get all that shit outta you, why don't you go over there an' knock on his fuckin' door, man, ya, ya think ya know where he's at an' all this shit...

C: ...See, when ya come outta those up-tempo goddamn numbers, man, it's impossible to make those transitions...an' then ya gotta go into somebody dyin'...

[Dog Growls]

C: ...Goddammit if we can't come outta a slow record, I don't understand it...

CBJ: (Unintelligible)

C: Why are we doin' these instrumentals? Cause we got 'em?... I don't understand it...

V1: This is also nothing new.

C: I don't understand it...

V1: This is also nothing new.

C: I don't understand it...

CBJ: (Unintelligible)... Cocksucker!

V1: I think that people read more into the music than is really there...

C: Will somebody find out the goddamn answer?

V1: In the 50's, they considered it vulgar and despicable to have songs like "Teach Me Tonight," "Let's Do It" by Cole Porter, "All Of You" by Cole Porter– those were considered euphemisms for something dirty.

C: Who gives a shit!

V1: Some vulgar, dirty act.

C: Diddly shit, diddly shit!

V1: The Kingston Trio sang a song that used the word "damn"; it was banned on the radio.

C: Goddammit!

V1: In the 60's it was a song called "Louie, Louie"...

C: Goddammit!

V1: ...it was played upside, backwards...

C: Goddammit!

V1: ...every way they could play it, looking for the dirty message.

C: Goddammit!

V1: They never found the dirty message; the FCC was brought in...

C: Oh, Fuck!

V1: Uhh, in the 70's, people went through the same period, looking for the dirtiness of the song.

S: SATAN!... HAIL, SATAN!

V1: I... *waaat?*

S: HAIL!...[WHSSSHHH]

V1: I...

S: HAIL!... [WHSSSHHH]

V1: I... I really don't think that the Satanic message is there...

CBJ: Go out an fuckin' find 'em, man.

C: Snuggles.

CB2: You better be prepared to meet your Maker...

C: Fuck!

CB2: I..I..I'm after your ass, boy...

CBJ: Aaaur, sounds like one of those gay Bay boys...

C: Snuggles.

CB2: Definitely, meet me at Mohr Lane and, uh, Monument. I wanna personally meet you.

C: Fuck!

CB2: You'll see me...

C: Snuggles.

CB2: ...I'll be wearin' a red and white baseball cap, says "ABC Auto Parts" on it...

C: OK...

CB2: Can't miss me, son...

C: OK...

CBJ: Oh, he sounds like a real fancy dresser, now, don't he, ha, ha?

C: OK...

CB2: I'm gonna whup your *fuckin'* ass!

C: OK, I want a goddam concerted effort to come out of a record that isn't a fucking up-tempo record every time I do a goddam death dedication! It's the last goddam time, I want somebody to use his fuckin' brain to not come out of a goddam record, that is, uhh, that, that's up-tempo an' I gotta talk about a fuckin' dog dyin'!

CB3: That guy gets himself into so much shit!

CB1: ...stupid shithead again...

CB3: Who knows? He might be the straightest kid in town.

C: Boy, is this fuckin' ponderous, man. Ponderous, fuckin' ponderous!

CB3: Eat shit and die, Richard!

C: "This is American Top 40, right here on the radio station you grew up with. Music Radio 138..." Oh, Fuck!

CB1: Oh, *fuck you*, Liz...

CB3: Well, fuck You Too, Richard.

CB1: *Auuuw, fuck you, Liz!*

CB3: Fuck You Too, Richard!

CB1: You'd *like* to, yeah, *wouldn't* ya?

CB3: Oh, I'm *such* a nice kid, though.

[End of Track 2]

San Francisco Chronicle ☆☆☆ MONDAY, MAY 23, 1994

China to Jail — Even Execute — Copyright Pirates

Reuters

Beijing

China, under fire from the United States for not protecting intellectual property rights, has promised to jail or even execute copyright and trademark pirates, official media reported Saturday.

"Criminal sanctions must be imposed on those who commit intellectual property right offenses to safeguard the integrity of ideas and the dignity of law," Justice Minister Xiao Yang told a conference, the China Daily paper said.

Another senior official assured the symposium on intellectual property protection in Beijing that China was ready even to shoot violators of trademarks.

"Violators of trademark laws face harsh penalties — up to life imprisonment and (the) death sentence," Xinhua news agency quoted Li Bida, deputy director of the trademark office of the State Administration for Industry and Commerce, as saying.

The United States recently put off an expected decision to brand China as a major pirate of U.S. books, music, movies and computer software to give the two sides more time for negotiation.

The piracy decision is now due by June 30, nearly a month after President Clinton's deadline for deciding whether to renew China's Most Favored Nation (MFN) special trade status.

Negativland Discography

ALBUMS

1980 .. Negativland ..... Seeland 001 CD
1981 .. "Points" ..... Seeland 002 CD
1983 .. A Big 10-8 Place ..... Seeland 003 CD
1987 .. Escape From Noise ..... SST 133/RecRec 17 LP/Cass/CD
1989 .. Helter Stupid ..... SST 252/RecRec 29 LP/Cass/CD
1993 .. Free ..... Seeland 009 CD

VIDEO

1989 .. No Other Possibility ..... Seeland 005 VHS
(60 minutes, NTSC only)

SINGLE

[no longer available]
1991 .. U2 ..... SST 272 12"/Cass/CD

EP

1992 .. Guns ..... SST 291 12"/Cass/CD

MAGAZINE + CD

[no longer available]
1992 .. The Letter U and the Numeral 2 ..... Seeland 008 CD

BOOK + CD

1995 ... Fair Use, The Story of the Letter U and the Numeral 2 ..... Seeland 013 CD-B

'OVER THE EDGE' RELEASES

edited from Negativland's weekly radio show

1985 ... Vol. 1: JamCon '84 ..... Seeland 004 CD
1985 ... Vol. 1-1/2: The Starting Line (reissue coming in 1995) CD
1990 ... Vol. 2: Pastor Dick ..... (reissue coming in 1995) CD
1990 ... Vol. 3: The Weatherman ..... (reissue coming in 1995) CD
1990 ... Vol. 4: Dick Vaughn ..... (reissue coming in 1995) CD
1993 ... Vol. 5: Crosley Bendix ..... Seeland 010 CD
1994 ... Vol. 6: The Willsaphone Stupid Show .. Seeland 011CD
(Double CD)
1994 ... Vol. 7: Time Zones Exchange Project .. Seeland 012CD
(Double CD)

Most of these items are available from:
negativmailorderland • 109 Minna #39 • San Francisco CA 94105
Write to them for more information.

Cassette dubs of complete, unedited OTE shows
from 1986 to the present are available from:
OTE Tapes • 497 43rd Street • Oakland CA 94609
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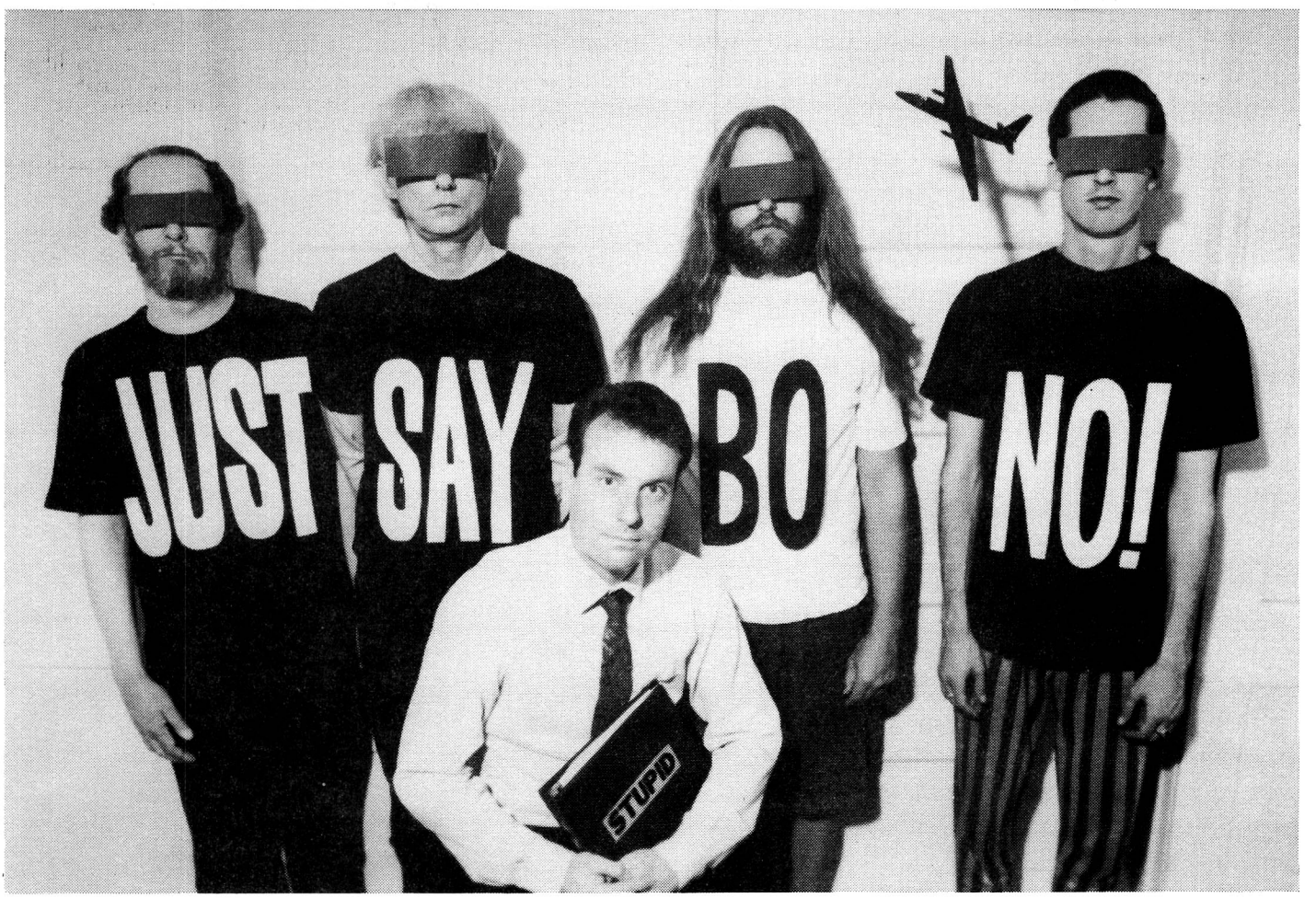

Members of Negativland pose with their attorney, Hal Stakke.

Thank You

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Negativland does not mind having been sampled without permission or payment by the following artists and record labels (among others):

Marky Mark and the Funky Bunch
Music for the People
Interscope/Atlantic 7 91737-2

A Guy Called Gerald
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Holger Hiller
As Is
Mute/Warner 9 61227-2

John Oswald
Plexure
Avant Records R-340188

1989 MTV Rock Video Awards

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NEGATIVLAND ON THE INTERNET
For those with Internet access, Negativland's World Wide Web site collects extensive material about the group, more information on fair use, copyright law, creative appropriation, and free speech, and includes links to related Web pages. Point your Web browser (Mosaic, Netscape, or whatever) at:

http://sunsite.unc.edu/negativland/

SNUGGLES
Trickling Stream Memorial Pet Park
Cincinnati OH

FAIR USE CD Notes

DEAD DOG RECORDS

1	*Part One:*	Snuggles	2:46
2	*Part Two:*	Keep Your Evenings Free	4:20
3	*Part Three:*	Please Don't Sue Us	4:01
4	*Part Four:*	Gimme The Mermaid	4:30
5	*Part Five:*	It Ain't Legit	4:29
6	*Part Six:*	You Must Respect Copyright	2:30
7	*Part Seven:*	How Long Have You Been Waiting For U2?	7:48
8	*Part Eight:*	A Nickel Per Fish Sandwich	8:00
9	*Part Nine:*	Only A Sample	8:02

Dead Dog Records was recorded, mixed, and edited by Negativland in the summer and fall of 1994.

TOTAL TIME 46:26

CROSLEY BENDIX DISCUSSES THE U. S. COPYRIGHT ACT

10 *Crosley Bendix Discusses the U. S. Copyright Act* was recorded on *Over The Edge*, Negativland's weekly live radio show, and was first released in 1992 in the original magazine/CD package *The Letter U and The Numeral 2*. It was the only track on that CD.

TOTAL TIME 25:56

Sources appearing in *Dead Dog Records*:

ABC
NBC
CBS
CBC
PBS
NPR
FOX
ABS
Wiseguy
Casey Kasem
A Real Dog
The Shangri-La's
Usha Uthup
Wild Bill Hickock
Jingles P. Jones
Elizabeth Claire Prophet
David Ross
Big Daddy
The Edge
XTC
Captain Beefheart
The Chipmunks
Slim Whitman
Holger Hiller
Lightning Hopkins
Chumbawumba
Muddy Waters
The Rolling Stones
James Gabbert
Ray Rienhart
Scott Beach
Led Zeppelin
Jim Bohannon
Perry & Kingsley
Johann Strauss
Little Roger and the Goosebumps
Tom Waits
Marilyn Quayle
David Byrne
The Code
The Little Mermaid
Dean Martin
Danny O'Day and Farfel
Black Flag
The Weatherman
Byram Abbott
James Snothed
Marky Mark and the Funky Bunch
Jeff Koons
The History of Radio
Nina Totenberg
Linda Wortheimer
2 Live Crew
Roy Orbison
Alan M. Turk
Perez Prado
Brian Robertson
The Jerky Boys
Dan Lynch
Ewan Hughes
Merle Travis
U2
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TM Productions
Rush Limbaugh
MTV Music Video Awards
B.P. Fallon
Zoo Radio Transmit
De La Soul
Flo and Eddie
Mike Oldfield
Zoo T.V. (TV)
Crime Photographer
Radioactive Goldfish
Bob Basanich
Tibetan Monks
Bono
Taco Bell
Dana Carvey
Larry King
Evolution Control Commitee
Mark Hamill
Batman
George David Weis
Alan Dershowitz
Bernard Herrmann
Charles Ferris
Penguin Cafe Orchestra
Sammy Davis Jr.
Jerry Spence
Tony Hollins
Brian Eno
Bing Crosby
Wendy Carlos
The Andrews Sisters
Dick Haymes
Ethel Merman
Xerox Technology

...and a lot of original sounds made and played by Negativland.


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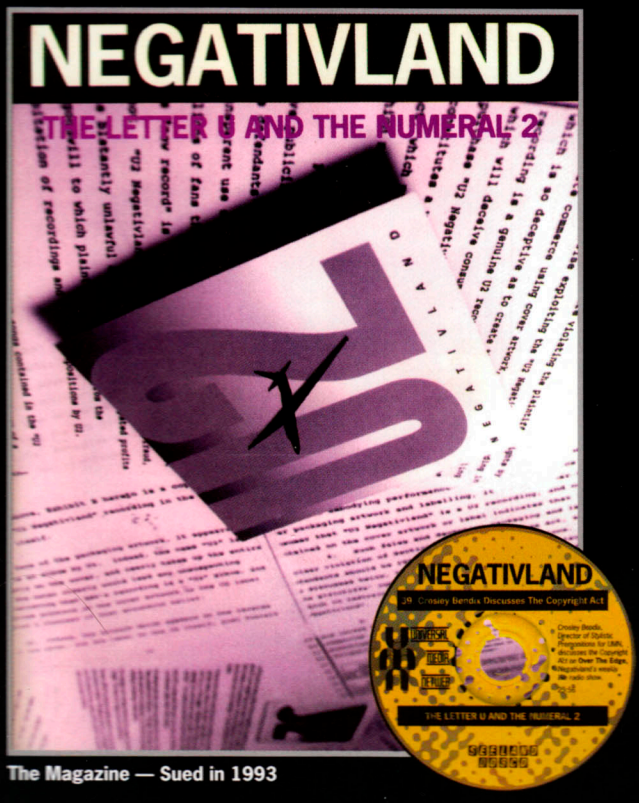
The Single — Sued in 1991



The Magazine — Sued in 1993

"Declared heroic by their peers for stealing other people's music and refashioning it into what the band considers more honest statements, Negativland suggests that refusing to be original, in the traditional sense, is the only way to make art that has any depth within commodity capitalism."
–New York Times

"One of pop music's most intriguing dramas...dripping with irony."
–Washington Post

"Negativland learned the hard way: Actively subverting the pop music establishment can make it rain lawyers...you get to see up close how dirty and stupid it all is...fascinating..."
–Los Angeles Times

"Brutally hilarious...the self-styled pirate guardians of what's left of public consciousness."
–Village Voice

"Negativland stays outside the walls of corporate America and launch their viruses inside via catapult."
–Douglas Rushkoff, Media Virus!

"A profane dismissal of U2...wonderfully dry...typically deconstructive..."
–Dallas Morning News

"Consider this [book] a benefit for the right to make fun of Bono and your gutless record company...They'd probably quote McLuhan or some other *nouveau philosophe* if you let them...but the fact is Negativland manipulates the media just for the fun of it."
–L.A. Weekly

"Better known for media pranks than records."
–Time Magazine

"All the above media quotes...have been taken out of context and...edited. They are specifically constructed to help...sell this book...and give it mainstream [acceptability]...but do not necessarily represent or...accurately reflect...the...actual views of the original writers...and are in fact...meaningless."
–Negativland

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